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RACIAL IMBALANCE, BLACK SEPARATISM, AND PERMISSIBLE CLASSIFICATON BY RACE

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IT may fairly be said that the issue of state and federal power to classify by race presents a constitutional dilemma "of the very first importance."[1] Although this issue has been raised in many areas, the problem of racial imbalance in public schools may best illustrate the dilemma, for it involves a direct confrontation of two basic principles of equality:[2] that governmental action should be indifferent to color[3] and that the right to an education should be available to all on even terms. The essential task is to reconcile those principles by creating equal educational opportunities for disadvantaged minorities without imposing inappropriate burdens upon either the majority or segments of any minority, and without establishing a constitutional rule which might support some future inequality. It is a task which is characteristic of important social problems both in its ease of description and in its resistance to solution.

The legal challenge to racial imbalance in the schools was precipitated on May 17, 1954, when the Supreme Court declared that "Separate educational facilities are inherently unequal."[4] The Court's decision brought to an end the eroded doctrine that a state could separate students in public schools solely because of their race so long as "equal" facilities were provided. The demise of that doctrine also cast suspicion on fortuitous imbalance which is often produced by imposing a neighborhood attendance plan on segregated housing patterns. In succeeding years that suspicion developed into a major constitutional and political debate.[5] While attention has con-

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1. A. BICKEL, THE LEAST DANGEROUS BRANCH 58 (1962).

2. For a discussion of recent trends in resolving the more prevalent conflict between equality and other values, *see* Kurland, *Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government"*, 78 HARV. L. REV. 143 (1964).

3. The "color-blindness" rule draws on the classic dissent of the first Justice Harlan in Plessy v. Ferguson, 163 U.S. 537, 559 (1896), and on the separate opinions of a number of other Justices. *See, e.g.*, Kotch v. Board of River Port Pilot Commrs., 330 U.S. 552, 566 (1947) (Justice Rutledge dissenting).

4. Brown v. Board of Educ., 347 U.S. 483, 495 (1954).

5. The literature, nearly all of which concentrates on general policy issues rather than on analysis of Supreme Court decisions, is voluminous. Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*, 71 YALE L.J. 1387 (1962); Carter, *De Facto School Segregation: An Examination of the Legal and Constitutional Questions Presented*, 16 W. RES. L. REV. 502 (1965); Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564 (1965);

centrated mainly on the duty of the states to relieve racial imbalance, the foremost issues concern permissible rather than mandatory remedial action. The controversy in all its forms has generated much unrest and has stimulated efforts to reduce the imbalance through a variety of transfer and rezoning plans which embody racial classifications.

Voluntary remedies classifying by race have frequently been upheld by state and lower federal courts. However, the cases have been conspicuously unsuccessful in developing rules of law which would not only sustain the action before the court, but adequately differentiate it from invidious uses of racial criteria. Some opinions have demanded corrective measures without considering the possibility that those measures might themselves run afoul of the Constitution if they are based on race, and might be totally ineffective if they are not.[6] When courts have faced the issue of permissible means, their response has usually been conclusory and sometimes disingenuous. One court ruled that a determination by the State Commissioner of Education that racial balance is essential to sound education was unreviewable, but did not explain why an administrative judgment favoring segregation would stand in a different posture.[7] Other cases have said only that a school board need not "close its eyes" to educational inequality,[8] and that it may consider race in a "proper" attempt to eliminate imbalance.[9] The contention that corrective racial action is constitutionally proscribed has been dismissed as "unrealistic"[10] and the "height of irony."[11] Many courts have been content to observe that the effects of de facto segregation are similar to those of de jure segregation, and to rely on other lower court cases which upheld remedial racial classification with

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Horowitz, *Unseparate but Unequal—The Emerging Fourteenth Amendment Issue in Public School Education*, 13 UCLA L. REV. 1147 (1966); Kaplan, *Segregation Litigation and the Schools—Part II: The General Northern Problem*, 58 NW. U. L. REV. 157 (1963); Maslow, *De Facto Public School Segregation*, 6 VILL. L. REV. 353 (1961); Sedler, *School Segregation in the North and West: Legal Aspects*, 7 ST. LOUIS L.J. 228 (1963); Wright, *Public School Desegregation: Legal Remedies for De Facto Segregation*, 40 N.Y.U. L. REV. 285 (1965).

6. *E.g.*, Jackson v. Pasadena City School Dist., 59 Cal. 2d 876, 382 P.2d 878, 31 Cal. Rptr. 606 (1963).

7. *In re* Vetere v. Allen, 15 N.Y.2d 259, 206 N.E.2d 174, 285 N.Y.S.2d 77, *cert. denied*, 382 U.S. 825 (1965). *See also* Olson v. Board of Educ., 250 F. Supp. 1000 (E.D.N.Y. 1966).

8. Morean v. Board of Educ., 42 N.J. 237, 200 A.2d 97 (1964).

9. Offermann v. Nitkowski, 248 F. Supp. 129 (W.D.N.Y. 1965), *aff'd*, 378 F.2d (2d Cir. 1967).

10. Fuller v. Volk, 230 F. Supp. 25 (D.N.J. 1964).

11. School Comm. v. Board of Educ., 352 Mass. 693, 227 N.E.2d 729 (1967), *appeal dismissed*, 389 U.S. 572 (1968).

little more than the same observation.[12] The result is a heavy accumulation of decisions permitting the use of racial criteria, but it is an accumulation which takes the form of an inverted pyramid.[13]

The lower court opinions in this area, and the likelihood of classification by race in other areas, suggest a need for close review of Supreme Court decisions involving state and federal programs drawn along racial lines. This Article will examine those decisions to determine the constitutional permissibility of racial classification. It will focus specifically on the correction of racial imbalance in the schools since that continues to be the subject of great activity and interest,[14] but a rule concerning classification by race would have potential application to jobs, to housing, and even to current proposals for black separatism. The Article will begin with a discussion of the *School Segregation Cases*[15] which have been invoked both to sustain and to invalidate corrective racial classification. It will then review federal discrimination against Japanese-Americans and against Indians, as well as the more obscure discrimination found in immigration and naturalization laws. It will also consider, in some detail, the paradoxical rules governing the discriminatory selection of jurors and, in lesser detail, the cases dealing with domestic relations and racial designations.[16] A concluding section will discuss black separatism and general policy matters relating to the correction of imbalance in the schools. The Article assumes throughout that the issue of racial classification, which has the capacity either to remedy past injustices or to create new ones, cannot be resolved on a result-oriented basis. Indeed, in the field of race relations, in which action has ranged from assaults on Jim Crow practices to the drive

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12. *E.g.*, Guida v. Board of Educ., 26 Conn. Supp. 121, 213 A.2d 843 (Conn. Super. 1965); Morean v. Board of Educ., 42 N.J. 237, 200 A.2d 97 (1964).

13. Opinions invalidating corrective measures that utilize race have been no more satisfactory than those reaching the opposite conclusion. *See* Tometz v. Board of Educ., No. 40292 (Ill. Sup. Ct., June 22, 1967), *noted in* 81 HARV. L. REV. 697 (1968), *rev'd on rehearing*, 39 Ill.2d 593, 237 N.E.2d 498 (1968).

14. Despite a new Negro emphasis on racial separation, a national opinion survey recently showed that an overwhelming majority of blacks prefer integrated schooling for their children. NEWSWEEK, June 30, 1969, at 20. *See also* R. MACK, OUR CHILDREN'S BURDEN 455, 461 (1968).

15. Brown v. Board of Educ., 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954).

16. Many of the familiar decisions invalidating classifications which deny benefits or impose burdens because of color will be noted only briefly, and tangential questions of standing to litigate and of the applicability of anti-discrimination statutes are omitted entirely. The latter points can affect the outcome of a given case, but they do not speak to the issue of state power. A glance at lower court litigation will show also that the standing requirement and the question whether corrective racial classifications conform to anti-discrimination laws have not forestalled decision on the constitutional merits.

for separatism by some Negroes, a result-motivated approach could answer at most the demands of this day only. But a "neutral" approach to the cases, it should be emphasized, is entirely compatible with a conscientious governmental response to the needs of black people and of disadvantaged members of other minorities.

I. The School Segregation Cases and Their Progeny

One of the striking aspects of the school segregation controversy is that it produced opinions of extraordinary surface simplicity. In *Brown v. Board of Education*,[17] for example, the Court took only ten pages to dispose of the most important question that had come before it in many years. Yet despite the simplicity of expression, or possibly because of it, there is widespread disagreement concerning the effect of that case on the issues raised by fortuitous racial imbalance. Some writers have suggested that *Brown* prohibits official use of racial factors, while others argue that the decision requires affirmative state action, including classification by race, to eliminate imbalance.[18] It was perhaps inevitable that an opinion which could lend itself to such diverse interpretation would create uncertainty among those who control the schools and frustration among those who do not.

Brown v. Board of Education was a consolidation of class actions brought on behalf of Negro minors who "had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race."[19] In each case the lower court had applied the "separate but equal" rule of *Plessy v. Ferguson*,[20] which held constitutional guarantees to be satisfied if the races were provided substantially equal, though separate, facilities. On review, the Supreme Court, using language which some commentators believe to be applicable to de facto segregation, prefaced its treatment of *Plessy* with heavy emphasis on the importance of formal education:

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[21]

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17. 347 U.S. 483 (1954).

18. Both views are considered in Bittker, *supra* note 5. *See also* note 46, *infra*; Fiss, *supra* note 5; Kaplan, *supra* note 5.

19. 347 U.S. 483, 488 (1954).

20. 163 U.S. 537 (1896).

21. 347 U.S. 483, 493 (1954).

The opinion then set out succinctly its basic rationale that segregated schools are inherently unequal and hence a denial of equal protection:

> To separate [Negro school children] . . . from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . .
>
> " . . . The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system." . . . Any language in *Plessy v. Ferguson* contrary to this finding is rejected.
>
> We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.[22]

Bolling v. Sharpe,[23] decided the same day, applied the *Brown* rationale to the District of Columbia. Since the equal protection clause was inapplicable there, the Court relied on fifth amendment due process:

> Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.[24]

Analysis of these cases should focus on three factors which might be thought to have controlled or contributed importantly to their outcome. One factor, stressed in *Bolling* but not in *Brown*, is the unreasonableness of the classification. If the *School Segregation Cases* stand for the proposition that race is an inherently arbitrary classification, state action employing racial criteria would seem to be invalid notwithstanding a purpose to alleviate imbalance. The other two elements, closely interrelated, are racial separation and the inherent inequality which separation was found to entail. If either state-imposed separation or inequality of educational opportunity was the decisive factor in *Brown*, the decision could require correction of imbalance arising out of the neighborhood school

22. 347 U.S. at 494-95.
23. 347 U.S. 497 (1954).
24. 347 U.S. at 500.

policy.[25] It is submitted that analysis of *Brown* and its progeny in these terms will reveal that the cases need not and should not be construed to prohibit racial classification for the purpose of reducing de facto segregation. But at the same time, those cases cannot be said to approve such classification.

A. *Racial Separation and Unequal Education*

It should be clear at the outset that the *School Segregation Cases* dealt specifically and exclusively with state-enforced segregation on the basis of race.[26] That fact, which the opinions carefully stressed, is both elementary and crucial to an understanding of the scope of the decisions. The cases did not hold that children have a constitutional right to attend an integrated school, although lower courts have sometimes extended them that far.[27] Indeed, since *Pierce v. Society of Sisters*[28] stated that laws requiring enrollment in public schools interfere unconstitutionally "with the liberty of parents and guardians to direct the upbringing and education of [their] children,"[29] *Brown* would seem to yield a principle of inclusion rather than a right to the joint presence of any particular group.[30] Nor should the cases be read to proscribe fortuitous segregation resulting from racially neutral classifications such as the neighborhood school plan. Whatever the future may hold for that enigmatic issue, the

25. Since these elements relate primarily to the issue of constitutional duty, they are discussed briefly and in the context of determining whether by indirection *Brown* gives an affirmative answer to questions of constitutional permissibility.

26. Although the Court said in *Brown* that the adverse effects of segregation are "'greater when it has the sanction of law,'" the opinion was silent as to whether any legal consequences attach to the "lesser" impact of unsanctioned segregation. Some language in *Brown* implies that it is the separation of the races that supports the finding of inequality that was fatal under the equal protection clause. But these references to separation were qualified by the phrase "solely because of their race" and so incorporate the element of racial classification.

27. *See* Blocker v. Board of Educ., 226 F. Supp. 208 (E.D.N.Y. 1964). In Green v. County School Bd., 391 U.S. 430 (1968), which imposed an affirmative duty on de jure segregated schools to convert to a unitary system, the Court expressly rejected an attempt to cast the issue in terms of whether the fourteenth amendment should be read "as universally requiring 'compulsory integration' . . . ." 391 U.S. at 437. *See* notes 227-38, 262 *infra* and accompanying text concerning requirements for dismantling dual school systems.

28. 268 U.S. 510 (1925).

29. 268 U.S. at 534-35.

30. Some doubt has been cast on the vitality of *Pierce* by the steady decline of substantive due process concepts on which it was premised, although with respect to noneconomic liberties the decline may be more apparent than real. *See* Griswold v. Connecticut, 381 U.S. 479 (1965), for an illustration of what can be regarded as "incorporation" of due process freedoms into the Bill of Rights. At any rate, most states would not make attendance in public schools mandatory, and the absence of such compulsion, together with the freedom of families to relocate, could render any right to attend integrated schools wholly illusory.

question simply was not presented in *Brown*, and the Court made no effort to reach it. This was implicit in the Court's request for amici curiae briefs from states "requiring or permitting racial discrimination," a request which would have enlisted virtually every state in the country if the quoted phrase had comprehended de facto segregation. The restricted meaning of the decision was made explicit in the second *Brown* case,[31] which advised lower courts, in fashioning remedies for de jure segregation, to "consider problems related to . . . revision of school districts and attendance areas into *compact units* to achieve a system of determining admission to the public schools on a nonracial basis . . . ."[32]

If *Brown* did not address itself to racial separation in the abstract, neither did it deal with abstract inequality. In fact, the Court has never held that the Constitution confers a right to share in the best academic facilities operated by the government. Such an unrestrained guarantee would ignore the diverse nature of a state's educational needs and the limitation of resources that makes it necessary to respond to those needs gradually. When *Brown* said that the opportunity of education "must be made available to all on equal terms," it could not have intended to foreclose temporary disparities or even long-term educational differences which, like special classes for the gifted or the underprivileged, are reasonably related to legitimate public interests.[33]

However, the *Brown* case has been construed to afford a qualified right to equal education. The thesis, as typically formulated, is that substantial differences in educational opportunity are impermissible except upon a showing of "adequate justification."[34] This interpretation has the ironic effect of making the *School Segregation Cases* applicable to schools that are not segregated, either fortuitously

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31. Brown v. Board of Educ., 349 U.S. 294 (1955).

32. 349 U.S. at 300-01 (emphasis added). Since segregated housing patterns were notorious long before 1955, the call for "compact" attendance zones clearly reveals the limited scope of *Brown* and *Bolling*. This limited scope is now favored by many blacks because neighborhood schools are suitable to community control. *See* notes 299-301 *infra* and accompanying text.

The "*Brown* case" as used herein refers to *Brown I* unless otherwise indicated.

33. Every state operates academic programs to which access is limited, and many federal programs—including national defense loans, "G.I." benefits and aid to elementary and secondary schools—involve educational inequalities which have not been thought to be unconstitutional. Too often the effects of school policy fall disproportionately on Negroes and on others who are economically disadvantaged. In most state universities, for example, the disproportions begin, but do not end, with requirements for admission.

34. Fiss, *supra* note 5; Horowitz, *supra* note 5; *cf.* Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

or by law, and to disparate treatment of members of the same race.[35] More recent decisions may suggest the invalidity of disparities based on inappropriate criteria, such as arbitrary geographical lines,[36] but it is unnecessary for purposes of this Article to examine such issues in detail. Judicial endorsement of a qualified right to educational equality would, in any event, provide no clear support for corrective classification by race; it would mean only that in certain circumstances remedial action of some kind is obligatory. Such an undefined mandate is not at all incompatible with the principle of color-blindness, a principle which might itself provide "adequate justification" for rejecting many proposed remedies.[37]

B. *Classification by Race*

The remaining question is whether racial classification is permissible under the *School Segregation Cases*. Most commentators

35. The interpretation encounters other difficulties as well. First, the school cases state only that segregation by race, which had always been invalid when it resulted in substantially unequal treatment, is unconstitutional in the field of education because in that field "separate facilities are inherently unequal." Accordingly, the discussion of inequality need signify nothing more than that the condition on which Plessy v. Ferguson, 163 U.S. 537 (1896), upheld racial separation is unattainable. Second, if the invalidation of segregation in the schools implies a general right to educational equality, how is one to construe the per curiam decisions that followed *Brown*? *See* notes 42-45 *infra*. Would they not give rise to a right of equal opportunity to enjoy parks, beaches and transportation facilities? Conceivably, the involuntariness of school attendance and *Brown's* emphasis on the importance of education might provide a basis for distinguishing. *But see* note 53 *infra*. Whether or not that is so, the proposed thesis would resurrect the equality test of the *Plessy* era. For a description of the sorry history of that test *see* Leflar and Davis, *Segregation in the Public Schools—1953*, 67 HARV. L. REV. 377, 392-402 (1954). While the new approach, unlike the old, would have a morally defensible objective, it would operate with the same unrefined tools for measuring equality and would introduce additional imponderables that bear on the question of justification.

36. *E.g.*, Reynolds v. Sims, 377 U.S. 533 (1964). *But see* McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969). For a discussion of the equal education thesis *see* A. WISE, RICH SCHOOLS, POOR SCHOOLS: THE PROMISE OF EQUAL EDUCATIONAL OPPORTUNITY (1968); for a critical view *see* Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 583 (1968).

37. Because of its imprecision, or what some may regard as "creative ambiguity," the *Brown* opinion is susceptible to highly simplistic expansion. It is easy, if one is willing to drive single-mindedly over stubborn obstacles, to construct a syllogism which embodies a desired result. For example, the neighborhood school policy could be toppled this way:

> Educational inequalities based on geography are unconstitutional; neighborhood schools cannot be equal because they draw students of uneven motivation and preparation; therefore, states must abandon the neighborhood system.

The unitary school concept of Green v. County School Bd., 391 U.S. 430 (1968), could be put to similar use:

> Because of past discrimination southern schools cannot employ otherwise valid plans that fail to achieve integration; de facto segregation is in part a product of official discrimination in housing; therefore, northern states must liquidate the effects of their discriminatory practices by integrating the schools.

These oversimplified illustrations underscore the need (1) to observe carefully what

agree that the decisions did not foreclose such classification.[38] The opinions were limited in terms to education, and the explicit reason for not applying *Plessy* was that separate facilities were seen as inherently unequal in that field. If *Brown* had imposed a general ban on racial lines, *Plessy* would have been obliterated rather than "out of place," and the discussion of separation and inequality which comprised much of the opinion would have been wholly gratuitous. The fact that the cases were argued on the theory of a constitutional color-bar[39] serves to underline the Court's familiarity with that approach and its choice of another rationale.[40]

But a more serious threat to the validity of corrective racial classification is presented when the school cases are interpreted in conjunction with the per curiam rulings which followed them. Although *Brown* had concluded only that "in the field of public education the doctrine of 'separate but equal' has no place,"[41] per curiam decisions soon struck down segregation in public parks,[42] busses,[43] golf courses,[44] and beaches.[45] Because racial distinctions were common to all the cases and because there was little evidence of inherent inequality in those cases decided per curiam, some writers have suggested that *Brown* and its progeny may prohibit all governmental classification by race.[46] Despite this impressive support, it is submitted that such an interpretation is not desirable, was probably not contemplated, and is certainly not required.

The first of the relevant per curiam decisions was handed down early in the 1955 Term.[47] The Court, citing no authority, affirmed a judgment invalidating state-enforced segregation of public beaches and bathhouses. Other per curiam holdings to the same effect came quickly.[48] Each of the cases raised an issue of state power to exclude

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the *School Segregation Cases* specifically decided, (2) to assign proper weight to competing values in determining where the decisions should lead us in the future, and (3) not to confuse points (1) and (2).

38. *See* L. HAND, THE BILL OF RIGHTS 54-55 (1958); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

39. *See* report of oral argument in 21 U.S.L.W. 3163 (Dec. 16, 1952); 22 U.S.L.W. 3157 (Dec. 15, 1953).

40. It is significant that Bolling v. Sharpe, 347 U.S. 497 (1954), characterized racial classifications as "suspect" but avoided the further step of holding them unconstitutional per se.

41. 347 U.S. 483, 495 (1954).

42. New Orleans City Park Improvement Assn. v. Detiege, 358 U.S. 54 (1958).

43. Gayle v. Browder, 352 U.S. 903 (1956).

44. Holmes v. City of Atlanta, 350 U.S. 879 (1955).

45. Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955).

46. P. KAUPER, FRONTIERS OF CONSTITUTIONAL LIBERTY 219 (1956) ("no classification based on race or color can be accepted"); Wechsler, *supra* note 38, at 32.

47. Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955).

48. *See* notes 42-44 *supra*.

Negroes from public facilities on racial grounds when allegedly equal facilities were available to them. Important and comprehensive as the question was, it surely did not call for a ruling as to whether official classification by race is inevitably unconstitutional in every context, without regard to its purpose or effect. And if the Court meant to embrace that far-reaching proposition, the vehicle of per curiam decision would seem a singularly inappropriate way to announce it.

The impression that the per curiam cases prohibit all racial classification rests largely on the view that those cases, in supposed contrast to *Brown*, were devoid of evidence of inherent inequality. Yet if there was little evidence that separate golf courses and similar separate facilities were incapable of equalization, there was even less support for the expansive notion that race is always unrelated to legitimate public objectives, or that such a relationship is necessarily irrelevant. More moderate approaches to the issue of segregated facilities were certainly available. The *Brown* case would clearly control some situations, such as attempts to restrict black students to the rear of a public school bus or to segregate them at school-sponsored athletic events.[49] Public playgrounds, too, though dissociated from the schools, might properly fall within the same rule since *Brown* relied on the "deleterious effects [of segregation] upon the colored children in implying their inferiority"[50]—effects which can be stimulated outside the classroom as well as within it. When facilities are ordinarily used exclusively by adults, the analogy to *Brown* is less compelling, but even in those instances the rationale of *Bolling v. Sharpe* remains persuasive. For if segregation in the schools "is not reasonably related to any proper governmental objective,"[51] it is difficult to see what legitimate purpose could be promoted by segregating other public facilities. School segregation implies an inferior status for Negro children, but "is it not equally relevant to suggest that Negroes may properly regard all segregation legislation as an expression of racial superiority by the white race?"[52] It seems that the implications of *Brown* and *Bolling* were bound to radiate beyond the schools and that a court

49. *Cf.* McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950), which applied the separate but equal doctrine to strike down official segregation in a university cafeteria and other school-related facilities.

50. Wechsler, *supra* note 38, at 32.

51. 347 U.S. 497, 500 (1954). The Court's implicit assumption that the associational preference of the white majority is not a legitimate public concern was forcefully challenged by Wechsler, *supra* note 38. *But see* Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

52. P. KAUPER, *supra* note 46, at 218.

committed to those cases could scarcely avoid the results announced per curiam.[53] If that is so, there is little reason to read into the decisions an intention to outlaw all uses of racial criteria. Rather, the scope of the issues actually presented in the cases, the alternative grounds on which those issues could be met, and the per curiam disposition[54] suggest a more modest rationale. All of the cases involved segregation by race at the behest of the politically dominant group, and none called for the adjudication of any other issue. Accordingly, the per curiam decisions should be interpreted together with the school cases as prohibiting official *segregation* of public facilities *by racial classification* directed against the minority class. This construction leaves open both the question of segregation based on other criteria and the question of purposeful integration by racial classification.[55]

II. The Japanese Relocation Cases

The mass evacuation and detention of Japanese-Americans during World War II constitutes the most repressive discrimination program

53. Attempts to distinguish between education and other state functions have been at best partially successful. The view that noneducational activities are susceptible to equalization without integration has failed to take account of the potential psychological damage of segregation outside the schools. The voluntary nature of these activities is also inconclusive since that feature dilutes the associational claims of the majority as well as those of the minority. Moreover, the importance of education, so much stressed in *Brown*, is not unique; housing, domestic relations, and hospital care, each of which has been the subject of segregation laws, also serve important human needs. Finally, the right to equal treatment has never been confined to "fundamental" freedoms. *See, e.g.*, Rinaldi v. Yeager, 384 U.S. 305 (1966). It is fair to say, all things considered, that the distinction between educational and other facilities was destined for an early demise. *See* Muir v. Louisville Park Theatrical Assn., 347 U.S. 971 (1954), in which, one week after *Brown*, a dispute over segregated recreational facilities was remanded "for consideration in the light of the Segregation Cases . . . and conditions that now prevail."

54. There is no doubt that the per curiam device has been misused on other occasions and little doubt that in the segregation Cases it would have been advisable to prepare at least one opinion to bridge the gap between educational and recreational facilities. *See generally* Brown, *Foreword: Process of Law, The Supreme Court 1957 Term*, 72 Harv. L. Rev. 77 (1958). Nevertheless, an expansive interpretation of per curiam results should not be favored without convincing supportive evidence.

55. Recent cases implementing *Brown* seem consistent with this analysis. For example, Goss v. Board of Educ., 373 U.S. 683 (1963), struck down a transfer plan which permitted students assigned to new schools, at which they were a racial minority, to return to their former schools in which they would constitute a majority. The Court emphasized that these racial classifications were productive of segregation: "The transfer plans being based solely on racial factors which, under their terms, inevitably lead toward segregation of the students by race, we conclude that they run counter to the admonition of Brown v. Board of Education, 349 U.S. 294 . . . ." 373 U.S. at 684-85. *Compare* Monroe v. Board of Commrs., 391 U.S. 450 (1968) *and* Green v. County School Bd., 391 U.S. 430 (1968) (free choice plans purposefully achieving minimal disruption to dual school system held invalid), *with* Alabama State Teachers Assn. v. Alabama Pub. School & College Authority, 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd per curiam*, 393 U.S. 400 (1969) (traditional free choice policy at the college level upheld as consistent with a unitary school plan).

undertaken by the federal government in modern times. Those measures deserve careful consideration since they probably mark, if they do not exceed, the outer limits of governmental power to classify racially.[56] The pertinent aspects of the program began on February 19, 1942, when President Roosevelt issued an executive order authorizing the Department of War to prescribe military areas "in such places and of such extent" as it might choose, from which "any or all persons" could be excluded or subjected to any restrictions.[57] Armed with that sweeping authority, General DeWitt, the military commander for the west coast states, issued a series of directives which culminated in the exclusion of more than 100,000 persons of Japanese descent from California, southern Arizona, and western Washington and Oregon, territory which he labeled Military Area No. 1. First, an 8:00 P.M. curfew was imposed on enemy aliens and all persons of Japanese ancestry in regions of the Pacific coast which included the metropolitan centers where those groups were heavily concentrated. Then he issued orders prohibiting Japanese-Americans from leaving Military Area No. 1 and confining them to centers where they were processed for evacuation and, usually, prolonged detention. In March, Congress strengthened the hand of the Executive by enacting a statute which made it a misdemeanor knowingly to violate restrictions imposed by a military commander in a military area.[58]

General DeWitt's curfew order was brought before the Supreme Court in *Hirabayashi v. United States*.[59] The appellant, an American citizen of Japanese ancestry and a student at the University of Washington, had been convicted on two counts of violating the federal statute by failing to report for pre-evacuation proceedings and by remaining away from home after 8:00 P.M. Since the sentences on those counts were to run concurrently, the Court considered the validity of the curfew only. Hirabayashi's principal contention was that the due process clause of the fifth amendment prohibited the differential treatment of persons of Japanese descent. Speaking through Mr. Chief Justice Stone, the Court unanimously rejected that contention:

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56. *See generally* J. TENBROEK, E. BARNHART & F. MATSON, PREJUDICE, WAR AND THE CONSTITUTION (1954); Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions*, 45 COLUM. L. REV. 175 (1945); Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945); Comment, *Alien Enemies and Japanese-Americans: A Problem of Wartime Controls*, 51 YALE L.J. 1316 (1942).

57. Exec. Order No. 9,066, 3 C.F.R. 1092, 1093 (1938-1943 Comp.).

58. Act of March 21, 1942, ch. 191, 56 Stat. 173.

59. 320 U.S. 81 (1943).

> Because racial discriminations are in most circumstances irrelevant and therefore prohibited, it by no means follows that, in dealing with the perils of war, Congress and the Executive are wholly precluded from taking into account those facts and circumstances which are relevant to measures for our national defense and for the successful prosecution of the war, and which may in fact place citizens of one ancestry in a different category from others. . . . The adoption by Government, in the crisis of war and of threatened invasion, of measures for the public safety based upon the recognition of facts and circumstances which indicate that a group of one national extraction may menace that safety more than others, is not wholly beyond the limits of the Constitution and is not to be condemned merely because in other and in most circumstances racial distinctions are irrelevant.[60]

The circumstances which saved the classification were (1) that the West Coast was peculiarly vulnerable to invasion or sabotage because of its proximity to Japan and because of its concentration of military and industrial facilities, (2) that previous discrimination against the Japanese had impeded their assimilation and encouraged continued attachment to Japanese institutions, and (3) that there were known to be disloyal elements in the Japanese community which could not readily be identified and isolated.

> We cannot say that these facts and circumstances, considered in the particular war setting, could afford no ground for differentiating citizens of Japanese ancestry from other groups in the United States. The fact alone that attack on our shores was threatened by Japan rather than another enemy power set these citizens apart from others who have no particular associations with Japan.[61]

Although the Chief Justice's guarded opinion avoided any decision on evacuation, it nevertheless became the basis for sustaining the exclusionary power when the evacuation issue was presented in *Korematsu v. United States*.[62] In the latter case, the Court, by a six-to-three majority, upheld the conviction of an American citizen of Japanese descent who had been found in Military Area No. 1 in violation of official orders, but whose personal loyalty was not questioned. It acknowledged that the exclusion restricted the civil rights of a single racial group and therefore was constitutionally "suspect," but stressed that the order was based on public necessity and not on racial antagonism:

> To cast this case into outlines of racial prejudice, without reference

60. 320 U.S. at 100-01.
61. 320 U.S. at 101.
62. 323 U.S. 214 (1944).

> to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.[63]

The *Relocation Cases* plainly support the view that racially differentiated governmental action is permissible in some circumstances.[64] According to those opinions, racial distinctions are "not wholly beyond the limits of the Constitution"[65] and may be justified by "pressing public necessity."[66] Yet the *Relocation Cases* have almost invariably been used to strike down, rather than to allow, official classification by race.[67] The inevitable question, therefore, is whether those decisions have current vitality insofar as they permitted differential treatment of Japanese-Americans in the context of war. For purposes of this Article that is the only issue, of the many raised by the evacuation, which requires discussion. On this issue it seems likely that, despite the odiousness of racial disabilities, the Court would adhere to the *Relocation Cases* in comparable circumstances of wartime emergency.[68]

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63. 323 U.S. at 223-24 (emphasis omitted). Justices Roberts, Murphy, and Jackson dissented but did not dispute the government's power to differentiate between Japanese-Americans and other persons, a power which each of them had voted to sustain in *Hirabayashi*.

64. Although the racial lines of the evacuation program were drawn in terms of ancestry rather than color, the Court regarded "race" as the classifying trait and attached no importance to that distinction. Some commentators, noting that Americans "having an ethnic affinity with our Asiatic enemy" were treated differently from those having an affinity "with our white European enemies," have equated the Japanese-American classification with differentiation by color. J. TENBROEK, E. BARNHART & F. MATSON, *supra* note 56, at 384 n.3.

65. Hirabayashi v. United States, 320 U.S. 81, 101 (1943).

66. Korematsu v. United States, 323 U.S. 214, 216 (1944).

67. The technique has been to leave the cases undisturbed but to cite them for the proposition that racial classifications are suspect. *E.g.*, McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

68. The fact that members of the Court who were thoroughly committed to the protection of civil liberties unanimously sustained the classification—as distinguished from the use to which that classification was put in *Korematsu*—is more revealing than views expressed "from the vantage point of . . . tranquil times." Warren, *The*

The most instructive, if uninspiring, cases on this question are those dealing with the constitutional rights of enemy aliens.[69] It has long been settled that the fifth and fourteenth amendments protect resident aliens,[70] and generally the outbreak of war has had little impact on the legal position of nationals of friendly countries.[71] But drastically different rules apply to the citizen of a nation at war with the United States. The Supreme Court has clearly stated that the federal government may seize his property without payment of compensation.[72] In addition, the enemy alien "is constitutionally subject to summary arrest, internment and deportation whenever a 'declared war' exists. Courts will entertain his plea for freedom from Executive custody only to ascertain the existence of a state of war and whether he is an alien enemy and so subject to the Alien Enemy Act."[73] These rules apply irrespective of the individual's personal loyalty to the United States and have been explained on the theory that the exercise of basic freedoms by an enemy alien would redound to the advantage of the enemy nation:

> The enemy alien is bound by an allegiance which commits him to lose no opportunity to forward the cause of our enemy; hence the United States, assuming him to be faithful to his allegiance, regards him as part of the enemy resources. It therefore takes measures to disable him from commission of hostile acts imputed as his intention because they are a duty to his sovereign.[74]

There was thus strong precedent for the differential treatment

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Bill of Rights and the Military, in THE GREAT RIGHTS 101 (E. Cahn ed. 1963). Although these cases were decided before *Bolling v. Sharpe*, the Court considered the issues of inequality through the due process clause, as *Bolling* was to do some years later.

69. "In the primary meaning of the words . . . an alien enemy is the subject of a foreign state at war with the United States." Techt v. Hughes, 229 N.Y. 222, 229, 128 N.E. 185, 186 (1920) (Judge Cardozo), *quoted with approval in* Johnson v. Eisentrager, 339 U.S. 763, 769 n.2 (1950). This is the meaning of the term as used in the Alien Enemy Act, which provides that "natives, citizens, denizens, or subjects" of a hostile nation "shall be liable to be apprehended, restrained, secured and removed" on order of the President. 50 U.S.C. § 21 (1964). Congress has sometimes explicitly limited the meaning of the term in statutes affecting property rights. *See* Guessefeldt v. McGrath, 342 U.S. 308 (1952).

70. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

71. Puttkammer, *Alien Enemies and Alien Friends*, in WAR AND THE LAW 38, 49 (E. Puttkammer ed. 1944).

72. Silesian-American Corp. v. Clark, 332 U.S. 469, 475 (1947); Cummings v. Deutsche Bank, 300 U.S. 115, 120 (1937); Brown v. United States, 12 U.S. (8 Cranch) 109, 121 (1814) (Chief Justice Marshall). *But cf.* Guessefeldt v. McGrath, 342 U.S. 308, 317-19 (1952). The right of friendly aliens to receive compensation was settled by Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931).

73. Johnson v. Eisentrager, 339 U.S. 763, 775 (1950).

74. 339 U.S. at 772-73.

of Japanese, German, and Italian aliens during the war.[75] The critical challenges to the classification of the *Relocation Cases* were that it (1) included not only Japanese nationals but also their descendants, and (2) did not include descendants of German and Italian nationals. The first was, to be sure, a significant step. Yet if Japanese aliens were subject to internment and deportation without a hearing solely because of their nationality, it would be difficult to show that Japanese-Americans who were born in the United States must remain totally immune to all differential treatment based on ancestry. Such radical differences in liability do not appear to have been justified by any known differences in the personality of the two groups. It was considered "naive" in the circumstances of the war to assume "that actual loyalties within the family corresponded to this rigid dichotomy"[76] between the Japanese alien and the United States citizen of Japanese descent. And while a plausible argument can be made that nationality is a more suitable classifying trait for a security program than ancestry, the distinction between the two types of classification is often subtle.[77] Both classifications are grossly overinclusive and are defensible, if at all, only because of the emergency produced by a declared war. Perhaps certain restrictions applicable to enemy nationals should be inapplicable to enemy descendants. But if differences in nationality warrant the severe restraints authorized by the

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75. The Alien Enemy Act was adopted by Congress in 1798 and has remained in effect with minor modifications in language. During both world wars enemy aliens were interned and enemy property seized. *See* Comment, *supra* note 56, at 1318. The statute was held to be valid in Ludecke v. Watkins, 335 U.S. 160 (1948), in which a German national was deported on order of the Attorney General after internment during the war. To the same effect, *see* the many lower court cases collected in the *Ludecke* opinion. 335 U.S. at 165 n.8. *Ludecke* did not suggest as lower courts sometimes had, that enemy aliens are not entitled to due process protection, a view which would be at odds with the settled rule that enemy aliens are "persons" within the meaning of the fifth amendment. Wong Wing v. United States, 163 U.S. 228 (1896).

76. Fairman, *The Law of Martial Rule*, 55 HARV. L. REV. 1253, 1302 (1942). In the case of Japanese-Americans, the source of the dichotomy also commended its de-emphasis. Children of Japanese immigrants had become American citizens by birth; the immigrants themselves were disqualified by statute, because of race and color, from eligibility for naturalization. *See* notes 112-16 *infra* and accompanying text. Distinctions like these, one may say without disrespect for citizenship, provide a dubious basis for allocating fundamental rights.

77. Nationality, like ancestry, may be inherited and frequently has no relation to personal loyalties. Under the rule of *jus sanguinis*, which is widely followed, a child wherever born acquires the nationality of his father. 2 C. HYDE, INTERNATIONAL LAW, 1073-78 (2d ed. 1945). Thus consanguinity may determine enemy status under either classification. Of course, ancestry cannot be voluntarily relinquished, as nationality sometimes can. But the validity of classification by national origin has not turned on whether or not aliens could or did renounce their foreign nationality. The Alien Enemy Act applies, for example, to "natives" of a hostile power, meaning those born in the enemy country, even though the status in question is involuntary and unalterable. United States *ex rel.* D'Esquiva v. Uhl, 137 F.2d 903 (2d Cir. 1943).

Alien Enemy Act, it is hard to deny that differences in ancestry may support at least some differential treatment.

The use of ancestry, rather than nationality, as a classifying trait can be better appraised when the alien enemy law is stripped of the fiction that nationals of hostile powers are bound to aid the enemy.[78] The notion that a resident alien has a legal duty to act illegally, notwithstanding his own sentiments to the contrary, is bad law and bad social psychology.[79] The real reason for upholding the enemy alien classification is not that personal commitments are irrelevant but that they are difficult to discern; and the reason for focusing attention on the class is that personal affiliation with an enemy nation is believed to enhance the potential for disloyal action. Affiliations of this kind cut across the lines of citizenship, however, and the suspicions which they generate probably have essentially the same foundations in the case of enemy descendants as in the case of enemy aliens.[80] Viewed from this perspective, the crucial issue is not so much whether the government classifies by nationality or by ancestry, but whether, under either classification, adequate opportunities are assured for individual adjudication and whether any burdens temporarily imposed are narrowly circumscribed.[81]

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78. Just why a resident alien should be conclusively presumed to give actual allegiance to the country from which he emigrated has never been made clear. In Great Britain the presumption led to the internment of Jewish refugees, apparently on the theory that they were in the country to do Hitler's bidding. *See* Cohn, *Legal Aspects of Internment*, 4 MOD. L. REV. 200 (1941).

79. *See* Rostow, *supra* note 56, at 519-20.

80. Reliable scientific evidence concerning the probable conduct of either class is scarce. Furthermore, since the principal internal danger during war is usually sporadic sabotage or espionage rather than mass disaffection, generalizations about group behavior have questionable value. It can be argued, on the other hand, that classification by ancestry and nationality should both be abandoned. However, courts have shown no inclination to protect enemy nationals in the face of wartime demands, and even Justices who favor substantial protection contend that "[t]he needs of the hour may well require summary apprehension and detention of alien enemies." Ludecke v. Watkins, 335 U.S. 160, 187 (1948) (Justice Douglas, dissenting).

81. There was widespread agreement during the war that the distinction between citizens and aliens should be rejected and that individual determinations of loyalty should be made at the earliest opportunity. There was also wide agreement that an overinclusive classification of suspects, drawn in terms of group affiliations, was necessary in order to disarm the few members of each group who presented a real threat and who could not be easily identified. *See, e.g.*, Rheinstein, *The Armed Forces and the Civilian Population*, in WAR AND THE LAW 58 (E. Puttkammer ed. 1944); Comment, *supra* note 56. The evidence concerning the extent of the threat has been extensively debated, but outspoken critics of the evacuation have conceded that in certain situations "some preventive action was imperative." J. TENBROEK, E. BARNHART & F. MATSON, *supra* note 56, at 284. Given the difficulty of distinguishing between real and apparent internal dangers, many observers felt that some differential action could have been devised, pending further investigation, which would have protected the national security and still avoided the repressive measures imposed upon Japanese-Americans.

The second ground for challenging the classification of the evacuation program was that it did not extend to German and Italian descendants and hence was underinclusive. Because exemptions of this type are less offensive than overinclusive ones, which reach innocent persons who happen to share circumstances with the blameworthy, they are said to be permissible if supported by "fair reason."[82] The justification offered by the War Department for exempting German and Italian descendants was that those groups were less dangerous than Japanese-Americans and that deployment of forces to deal with them would greatly "overtax our strength."[83] It was argued too that the inclusion of German and Italian descendants could prejudice loyal Japanese-Americans by delaying individualized treatment,[84] and finally that "the fact alone that attack on our shores was threatened by Japan rather than by another enemy power set [Japanese-American] citizens apart from others who have no particular association with Japan."[85]These considerations may have concealed the real motives for the evacuation, but they would probably constitute "fair reason" for an exemption from some kinds of differential action.

The foregoing analysis in no way implies the general viability of the *Relocation Cases*. Those cases have properly been condemned for permitting the imposition of highly obnoxious restraints on a long term basis, for dispensing with vital safeguards of procedural due process, and for relaxing judicial control over the military to an unprecedented level. What these excesses show, however, is not the unconstitutionality of the Japanese-American classification but an outrageous use of that classification.[86] It does not follow, of course, that because the government was allowed to classify racially during the emergency of total war, it may do so in the completely different context of the public schools. The significance of the *Relocation Cases* lies mainly in demonstrating that even racial lines which purposefully burden a minority race have not been held unconstitutional

82. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 348-51 (1949). *But cf.* McLaughlin v. Florida, 379 U.S. 184 (1964).

83. Quoted in J. TENBROEK, E. BARNHART & F. MATSON, *supra* note 56, at 303.

84. *Cf. Ex parte* Endo, 323 U.S. 283 (1944) (holding post-evacuation detention of loyal Japanese to be unauthorized).

85. Hirabayashi v. United States, 320 U.S. 81, 101 (1943).

86. As previously noted, the Supreme Court was unanimous in upholding the classification; disagreement centered on the nature of the disabilities which could be imposed. That such overinclusiveness need not produce harsh results was illustrated by the experience of alien hearing boards which conducted investigations "with a minimal interference with the standards of justice in the community" and which offered recommendations which prompted the parole or release of many enemy aliens arrested on suspicion. Rostow, *supra* note 56, at 493.

per se. Insofar as corrective racial classification in the schools may disadvantage one group or another,[87] this limited proposition seems a necessary, though insufficient, predicate for such classification.

III. Racial Discrimination Against Aliens

The war relocation program was not the first occasion for legitimating federal discrimination by race. In other areas, notably immigration and naturalization, the Court has declared Congressional power to be "plenary" so that racial classification is apparently not foreclosed.[88]

A. *Immigration and Deportation*

Immigration quotas, which were intended to preserve a desired racial balance in the population of the United States,[89] present an especially close analogy to the problem of de facto segregation. The *Chinese Exclusion Case*[90] is the logical starting point for discussion. In that case a Chinese alien who had lived in San Francisco for twelve years was denied re-entry to the United States following a brief visit to China. Before the trip he had been issued a certificate of re-entry pursuant to a federal law which suspended new immigration of Chinese laborers but exempted resident aliens who journeyed abroad.[91] Upon presenting the certificate, he was refused admission because a statute enacted during his return cruise voided all outstanding certificates and prohibited the re-entry of former resident Chinese laborers.[92] In the Supreme Court he contended that the statute deprived him of liberty without due process of law.

Mr. Justice Field, writing for a unanimous Court, upheld the statute and stated that the power to regulate immigration was an inherent incident of sovereignty and that no vested rights could be conferred by the certificate. He emphasized the "non-assimilability" of Chinese aliens and the fears which they had evoked.

> [T]hey remained strangers in the land, residing apart by themselves,

87. *See* notes 266-78 *infra* and accompanying text.

88. *See generally* C. Gordon & H. Rosenfield, Immigration Law and Procedure (rev. ed. 1967); M. Konvitz, The Alien and the Asiatic in American Law (1946); Boudin, *The Settler Within Our Gates*, 26 N.Y.U. L. Rev. 266 (1951); Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Pre-1917 Cases*, 68 Yale L.J. 1578 (1959); *Developments in the Law—Immigration and Nationality*, 66 Harv. L. Rev. 643 (1953); Comment, *The Alien and the Constitution*, 20 U. Chi. L. Rev. 547 (1953).

89. C. Gordon & H. Rosenfield, *supra* note 88, at 2-29.

90. Chae Chan Ping v. United States, 130 U.S. 581 (1889).

91. Act of May 6, 1882, ch. 126, § 4, 22 Stat. 58, *as amended*, Act of July 5, 1884, ch. 220, 23 Stat. 115.

92. Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504.

> and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people or to make any change in their habits or modes of living. As they grew in number each year the people of the coast saw, or believed they saw . . . great danger that at no distant day that portion of our country would be overrun by them unless prompt action was taken to restrict their immigration.[93]

The opinion then asserted that it was the nation's "highest duty" to provide security from foreign aggression.

> It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determination, so far as the subjects affected are concerned, are [sic] necessarily conclusive upon all its departments and officers. If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects . . . . [I]ts determination is conclusive upon the judiciary.[94]

The Court's vague references to nonassimilability, national security, unreviewability, and incidents of sovereignty left the rationale of the case in considerable doubt, but the power to exclude aliens on the basis of race was acknowledged unequivocally.[95]

In contrast to immigration practices, the authority to deport aliens has generally not been exerted along racial lines. However, *Fong Yue Ting v. United States*,[96] decided shortly after the exclusionary power had been sustained, dealt with a situation that approximated expulsion on the ground of race.[97] In *Fong* deportation proceedings were brought against Chinese aliens who did not possess certificates of residence, as required by federal law. A statute pro-

93. 130 U.S. 581, 595 (1889).

94. 130 U.S. at 606.

95. That power was exercised against Asiatic groups in 1917 and against persons ineligible for citizenship in 1924. M. KONVITZ, *supra* note 88, at 22-28. The power was reinforced by dicta broadly asserting that "No limits can be put by the courts upon the power of Congress to protect [against] . . . the advent of aliens whose race or habits render them undesirable as citizens . . . ." Wong Wing v. United States, 163 U.S. 228, 237 (1896).

96. 149 U.S. 698 (1893).

97. In subsequent cases, the authority to expel aliens, like the authority to exclude them, has been reasserted in broad terms. *See, e.g.*, Ng Fung Ho v. White, 259 U.S. 276, 280 (1921), stating that "Congress has power to order at any time the deportation of aliens whose presence in the country it deems hurtful . . . ."

vided that all resident Chinese laborers must apply for such certificates and that those failing to do so would be deemed to have entered the country unlawfully.[98] Deportation was mandatory unless the alien could show that he had been prevented by unavoidable cause from complying with the statute and could prove by a "white" witness that he was a resident at the time the statute was enacted.

Mr. Justice Gray stated for a six-to-three majority that the Court should not "undertake to pass upon political questions, the final decision of which has been committed by the Constitution to other departments of the government."[99] Reasoning from that admonition, he found that the power to expel residents was no less sweeping than the authority to exclude nonresidents: "The right of the nation to expel or deport foreigners who have not been naturalized or taken any steps toward becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."[100] The further requirement that residence be proved by the testimony of white witnesses was regarded as a legislatively prescribed rule of evidence and was upheld by analogy to naturalization provisions, which required certain proofs by the testimony of citizens rather than of aliens.[101]

The relevance of the alien exclusion cases to current questions of racial classification depends initially upon the rationale of the decisions. At least four interpretations are possible: (1) that constitutional limitations do not apply to immigration; (2) that nonresident aliens have no standing to press these claims; (3) that the question of who shall be admitted to the United States is inappropriate for judicial review; and (4) that constitutional limitations are applicable but were not transgressed. Each of those explanations is consistent with the plain import of the cases that Congress may discriminate by race in fixing the national immigration policy. The first three interpretations, however, whatever their merit, could have no bearing on the problem of racial imbalance in the schools. With respect to the fourth, a strong argument has been made that the *Chinese Exclusion Case* must have been predicated on the nonassimilability of Chinese aliens, since any other rationale would reduce the discussion of that factor to irrelevance.

98. Act of May 5, 1892, ch. 60, § 6, 27 Stat. 25.

99. 149 U.S. 698, 712 (1893).

100. 149 U.S. at 707. The Court emphasized that earlier statutes had not solved the problem of enforcing immigration restrictions, and it dismissed the substantive due process question with the observation that Yick Wo. v. Hopkins, 118 U.S. 356 (1886), on which the aliens relied, involved state power to regulate rather than federal power to deport.

101. 149 U.S. at 730.

> If the power of Congress to exclude foreigners is absolute, of what legal significance are the difficulties of the State of California because of the "Oriental invasion"? The answer is that . . . no arm of the Government is clothed with absolute power under the Constitution. No power in our Government can therefore be exercised voluntarily or arbitrarily, but must always be exercised in accordance with the spirit of the Constitution as gathered from all of its provisions. . . . Hence the elaborate defense of the Act of Congress by speaking of the necessity of preventing an alleged Oriental invasion.[102]

This suggestion that racial classification to prevent "overpopulation" by one race was held to be compatible with due process could make the case applicable to problems of de facto segregation.

There is much, indeed, to be said for the general proposition that plenary power to exclude aliens does not imply authority to act arbitrarily. The importance of maintaining a "regime of law" and of imposing proper limits on government transcends the interests immediately involved, whether they concern residents or nonresidents.[103] It is quite another matter, however, to construe the *Chinese Exclusion Case* as adopting and acting upon this principle. The fact that the opinion discussed the assimilability of Chinese aliens, which perhaps was unnecessary under the Court's basic approach, is inconclusive. The Court also discussed other issues which would become irrelevant if nonassimilability were decisive. The point on which it placed chief reliance was that the exclusionary power had been committed to the "conclusive determination" of the political departments of government.[104] Other alien admission cases have put the emphasis elsewhere, but they too disclaim rather than apply constitutional restraints. Thus *United States ex rel. Turner v. Williams*,[105] in which an alien was excluded on the ground that he was an anarchist, gave first amendment freedoms the same abrupt treatment that had been given to racial discrimination in earlier exclusion cases:

> [W]e suppose counsel does not deny that this Government has the power to exclude an alien who believes in or advocates the overthrow of the Government or of all governments by force or the assassination of officials. To put that question is to answer it. [106]

The *Turner* case does not delimit the protection afforded free speech, and the *Chinese Exclusion Case* does not measure the right to be free

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102. Boudin, *supra* note 88, at 460-61 (1951).

103. *See* Hart, *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1390 (1953).

104. Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889).

105. 194 U.S. 279 (1904).

106. 194 U.S. at 293.

from racial discrimination; indeed, these cases simply do not speak in terms of the Bill of Rights. Instead the Court has proceeded in this area from the broad premise that an "alien who seeks admission to this country may not do so under any claim of right."[107] Thus, since due process standards have not been applied to alien exclusion cases, those decisions lack persuasive appeal in areas like public education in which such standards are controlling.[108] And even under a contrary interpretation, the cases would have limited precedential value, for subsequent decisions such as *Bolling v. Sharpe*,[109] have made the federal government subject to restraints of equal protection as well as subject to nineteenth century notions of due process.

If the Court has not held that the use of racial criteria conforms to the requirements of due process in exclusion cases, it certainly has not implied that such criteria would survive a fifth amendment test in deportation proceedings. Constitutional safeguards have been applied far more rigorously in expulsion than in exclusion cases,[110] despite occasional dicta suggesting the equivalence of the two powers. Even *Fong Yue Ting* did not countenance expulsion of a race although it did approve a registration requirement applicable only to Chinese aliens and a presumption of unlawful entry attaching to noncompliance. Since there were other excluded classes who might have entered the country illegally, and since there were many lawfully resident Chinese, some of whom perhaps could not prove proper entry, the statute deserved much closer attention than it received in the majority opinion.[111] At any rate, it is clear that the

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107. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950).

108. It may fairly be said that the *Chinese Exclusion Case*, while not applying due process standards, appeared to regard racial disqualifications as reasonable. The implications of that view for de facto school segregation would be interesting to contemplate if the view had been based on reliable evidence and had recent support. It was based, however, on the premise that Chinese aliens were nonassimilable. Neither that premise nor the theory that racial exclusions are reasonable has had much support of late.

109. 347 U.S. 497 (1954).

110. *Compare* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953) (alien seeking admission is not entitled to procedural due process), *with* Kwong Hai Chew v. Colding, 344 U.S. 590 (1953) (resident alien has constitutional right to fair hearing). *But cf.* Galvan v. Press, 347 U.S. 522 (1954), indicating that substantive due process standards are inapplicable to both deportation and exclusion.

111. The constitutional validity of an alien registration requirement was implied in Hines v. Davidowitz, 312 U.S. 52 (1941), but different issues are presented when the requirement runs against a single racial class. Closer attention should also have been given to the special procedural rules applied to Chinese aliens. Only persons of Chinese descent were required to prove lawful residence by witnesses of a particular race with whom they probably had limited contact. Furthermore, upon a claim of citizenship, the burden of proof fell on the claimant if he was Chinese, but on the Government in all other cases. *See* United States *ex rel.* Bilokumsky v.

Court viewed the provision as a means of enforcing the immigration law, and made no attempt to justify it on independent grounds. Consequently, the racial classification sustained in *Fong Yue Ting* should be absorbed under whatever rationale underlies the immigration cases.

B. *Naturalization Laws and Their By-Products*

Beginning in 1790 Congress imposed racial restrictions on the eligibility of aliens for naturalization,[112] and those restrictions led in turn to collateral disabilities at the state and local levels of government. The leading cases on those respective problems were *Ozawa v. United States*[113] and *Terrace v. Thompson*.[114] In *Ozawa* a Japanese alien, who was admittedly well qualified by education and character, applied for American citizenship after twenty years of continuous residence in the United States. His application was denied on the ground that he was a member of the Japanese "race" and hence was ineligible for naturalization under a statute making citizenship available to "free white persons and . . . persons of African descent."[115] The Supreme Court, responding to certified questions of statutory construction, held that Japanese aliens were ineligible for naturalization under the quoted provision, but it did not consider the constitutionality of the racial disqualification. In *Terrace* the same disqualification served to restrict the freedom of Japanese aliens to own real property. The plaintiffs in that case sought to enjoin the enforcement of a state statute prohibiting land ownership by aliens who had not declared their intention to become citizens. The Court rejected a contention that the prospective application of the statute to prevent the leasing of property to Japanese aliens would violate the due process and equal protection clauses of the fourteenth amendment:

> The rule established by Congress on this subject, in and of itself, furnishes a reasonable basis for classification in a state law withholding from aliens the privilege of land ownership as defined in the act. . . .
>
> "It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of, the state, and, so lacking, the state may rightfully deny

Tod, 263 U.S. 149 (1923). For these procedural variations, there was surely no justification. *Cf.* United States *ex rel.* Lee Kum Hoy v. Murff, 355 U.S. 169 (1957).

112. Act of March 26, 1790, ch. 3, 1 Stat. 103.

113. 260 U.S. 178 (1922). *See also* United States v. Thind, 261 U.S. 204 (1923).

114. 263 U.S. 197 (1923).

115. Act of July 14, 1870, ch. 254, § 7, 16 Stat. 254 [REV. STAT. § 2169], *as amended*, Act of Feb. 18, 1875, ch. 80, 18 Stat. 318.

> him the right to own and lease real estate within its boundaries. If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of non-citizens."[116]

The naturalization and alien land cases shed no light on the validity of corrective classification by race. The former began and ended with an inquiry into the intent of Congress. No constitutional question seems to have been raised, and none was decided. Later the Court gratuitously announced in *Terrace* that "Congress is not trammeled, and it may grant or withhold the privilege of naturalization upon any grounds or without any reason, as it sees fit."[117] The clear implication of this dictum was that the privilege of citizenship could be withheld on grounds which do not satisfy fifth amendment standards.

The alien land cases, on the other hand, passed directly on the issues of due process and equal protection. But while state incorporation of federal classification by race was there sustained, it is doubtful that those decisions represent the present law. The Court's lame analysis of the issues has been well exposed.[118] The basic point is that federal use of a particular standard for one purpose could not establish the validity of state applications of that standard to an entirely different purpose. No doubt this would have been self-evident if the states had conditioned a criminal defendant's right to a fair trial upon his eligibility for citizenship. But common-law restrictions peculiar to land ownership[119] facilitated a ruling that the naturalization law "in and of itself furnishes a reasonable basis"[120] for the state classification. That ruling was unsound when issued and has been undermined by subsequent decisions.[121] Accordingly, state courts have taken the initiative in repudiating the *Terrace* case and in holding alien land laws invalid on fourteenth amendment grounds.[122]

IV. Relations with Indian Tribes

Perhaps more applicable to present problems concerning the government's use of racial criteria is the historic differential treat-

116. 263 U.S. 197, 220-21 (1923).
117. 263 U.S. at 220.
118. *See, e.g.*, McGovney, *Anti-Japanese Land Laws of California and Ten Other States*, 35 Calif. L. Rev. 7 (1947).
119. M. Konvitz, *supra* note 88, at 148-53.
120. Terrace v. Thompson, 263 U.S. 197, 220 (1923).
121. Oyama v. California, 332 U.S. 633 (1948). *See also* Takahashi v. Fish & Game Commn., 334 U.S. 410 (1948).
122. Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952); Namba v. McCourt, 185 Ore. 579, 204 P.2d 569 (1949).

ment of Indians. Special restrictions have been placed on the freedom of Indians to alienate property, and the administration of criminal law in the Indian country has varied, depending on whether those involved in the offense were Indians.[123] In a few instances Indians have received preferential or compensatory treatment, a practice which may bear on the validity of some proposals to alleviate the consequences of prejudice against Negroes.

The central question concerning the applicability of this body of law to other groups is whether or not the differential treatment of Indians is based on race. The late Felix Cohen argued vigorously that it is not. He emphasized that the relevant constitutional provisions[124] refer to Indian "tribes" and Indians "not taxed," and he urged that these are political designations which confer "no authority to govern Indians as a racial group."[125] Under Cohen's view the special treatment of Indians can be explained by their allegiance to resident tribal nations, thereby making this line of precedents inapplicable to any other class, and enabling individual Indians to secure nondifferential treatment by severing their tribal ties. Support for his view is implicit in the principle of tribal self-government, which has a nonracial basis described by Chief Justice Marshall in a landmark case:[126]

> The Indian nations had always been considered as distinct, independent, political communities . . . .
>
> . . . .
>
> . . . The very fact of repeated treaties with them recognizes [their right of self-government]; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government—by associating with a stronger, and taking its protection. . . .
>
> The Cherokee nation, then, is a distinct community. . . . The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.[127]

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123. For an extensive account of these issues, *see* U.S. DEPARTMENT OF THE INTERIOR, FEDERAL INDIAN LAW (1966). *See also* Brown, *The Indian Problem and the Law*, 39 YALE L.J. 307 (1930); Cohen, *Indian Rights and the Federal Courts*, 24 MINN. L. REV. 144 (1940); Krieger, *Principles of the Indian Law and the Act of June 18, 1934*, 3 GEO. WASH. L. REV. 279 (1935).

124. The principal sources of federal authority over Indians are the commerce clause (U.S. CONST. art. 1, § 8), and the powers to make treaties (U.S. CONST. art. 2, § 2) and to regulate territories and possessions (U.S. CONST. art. 4, § 3). FEDERAL INDIAN LAW, *supra* note 123, at 21-33.

125. Cohen, *supra* note 123, at 186 (emphasis omitted).

126. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

127. 31 U.S. (6 Pet.) at 559-61.

Similar support for Cohen's thesis is found in *Elk v. Wilkins*,[128] which relied on tribal rather than racial factors in holding that the fourteenth amendment does not confer citizenship on Indians born in the United States:

> Indians born within the territorial limits of the United States, members of, and owing immediate allegiance, to one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, are no more "born in the United States and subject to the jurisdiction thereof," within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations.[129]

Nevertheless, although much federal Indian law can be explained on a racially neutral basis, some of it cannot. For example, Congress has at times removed restraints on alienation of property for mixed-blood Indians while retaining them for full-bloods. A classification in terms of the quantum of Indian blood is blatantly unrelated to tribal affiliation, and yet this statutory scheme was enforced by the Supreme Court in a series of cases.[130] Since restraints on freedom of alienation were designed "to protect the Indian against sharp practices,"[131] governmental action lifting the restraints for mixed-bloods and preserving them for full-bloods must reflect a legislative determination as to the capabilities of each group. Occasionally courts have explicitly endorsed that determination,[132] but more often they have simply affirmed that "it was within the power of Congress to continue to restrict alienation by requiring, as to full-blood Indians, the consent of the Secretary of the Interior to a proposed alienation . . . ."[133] In either event, racial generalizations were accepted in lieu of a precise classifying trait.

Racial considerations have similarly affected jurisdiction over crimes in the Indian country. Although federal criminal law extends generally to that territory, statutes have made it specifically inap-

128. 112 U.S. 94 (1884).

129. 112 U.S. at 102.

130. United States v. Waller, 243 U.S. 452 (1917); United States v. First Natl. Bank, 234 U.S. 245 (1914); Tiger v. Western Inv. Co., 221 U.S. 286 (1911). *See also* United States v. Ferguson, 247 U.S. 175 (1918) (administrative determination of blood quantum held final).

131. FEDERAL INDIAN LAW, *supra* note 123, at 788.

132. "The varying degrees of blood most naturally become the lines of demarcation between the different classes, because experience shows that generally speaking the greater percentage of Indian blood a given allottee has, the less capable he is by natural qualification and experience to manage his property. . . ." United States v. Shock, 187 F. 862, 870 (1911).

133. Tiger v. Western Inv. Co., 221 U.S. 286, 316 (1911).

plicable to offenses between Indians. In *United States v. Rogers*,[134] the Supreme Court construed an exemption from federal jurisdiction for crimes committed "by one Indian against the person or property of another Indian" to be based on the race of the parties rather than on tribal membership. In holding that a white defendant who had become a member of an Indian tribe through marriage was not exempted, the Court stated:

> [T]he exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally,—of the family of Indians; and it intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs . . . .
> . . . Whatever obligations the prisoner may have taken upon himself by becoming a Cherokee by adoption, his responsibility to the laws of the United States remained unchanged and undiminished. He was still a white man, of the white race, and therefore not within the exception in the act of Congress.[135]

Since federal, state, and tribal laws, and their administration are subject to wide variation, the *Rogers* interpretation placed a significant racial condition on the imposition of criminal sanctions in this area.[136]

A number of civil statutes bear similar overtones of race but have not been authoritatively construed. One provision states that a "white man, not otherwise a member of any tribe" acquires no right to tribal property by marriage.[137] The statute evidently does not operate against Indians or other nonwhites who are not members of any tribe. Federal law also provides that in all trials involving property disputes between an Indian and a white person "the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."[138] Finally, Congress has directed that preferences be given to qualified Indians in filling vacancies for various positions in the Indian Office.[139] In some cases the mandate

134. 45 U.S. (4 How.) 567 (1846).
135. 45 U.S. (4 How.) at 572-73.
136. Under provisions presently in effect, jurisdiction over crimes in the Indian country continues to depend in some instances on whether both the defendant and the victim are Indians. 18 U.S.C. §§ 1152, 1153 (1964). *See* FEDERAL INDIAN LAW, *supra* note 123, at 319-25. However, the current provisions have been held by lower courts to have tribal, not racial, connotations. *E.g.*, State v. Williams, 13 Wash. 335, 43 P. 15 (1895).
137. 25 U.S.C. § 181 (1964).
138. 25 U.S.C. § 194 (1964).
139. 25 U.S.C. §§ 44, 46, 472 (1964). These preferences were retained in explicit terms by the Civil Rights Act of 1964. 42 U.S.C. § 2000e-2(i) (1964).

for preferential hiring has been tied unmistakably to race rather than to tribal membership.[140]

It is not unlikely that many commentators will look upon the differential treatment of the Indian as a favorable precedent for utilizing racial classifications to remedy injustices to the Negro. Federal Indian law has classified by race,[141] and in many respects the law has been directed toward the protection of the disadvantaged minority. Some special treatment of the Indian might be explained by previous tribal relations, since those relations may have continuing detrimental effects which arguably the government should have power to neutralize. But that theory would not justify differential action based on quantum of Indian blood. Furthermore, the argument for preferential treatment of Negroes may legitimately urge that the residual effects of slavery, black codes, and segregation are no less debilitating than those of tribal isolation.

Yet despite those similarities, there are compelling reasons for courts to hesitate in adopting the analogy. First, it should be noted that the special status of Indians has rested in large part on the premise that they are a vulnerable people who, for their own protection, must be made wards of the national government. Inasmuch as this assumption often referred to the weakness of Indian persons rather than of Indian "nations," it reflects attitudes of white supremacy[142] that are plainly at odds with the past thirty years of race relations case law and hence provides a dubious basis for treating other minorities. Second, even if the analogy between the Negro and the Indian were apt, the history of United States-Indian relations is scarcely one which inspires imitation. Instead, that history might better serve "to warn us that the role of the Great White Father may be bitterly resented by those in his tutelage and that a guardian ordinarily prefers to postpone rather than to advance the day when his wards must face the rigors of freedom."[143] Third, a racial interpretation in this area places undue stress on a small portion of a large body of law. Although some cases involve classification by race, most of them are

140. 25 U.S.C. § 45 (1964) (preferences for "persons of Indian descent").

141. This use of racial criteria cannot be explained and, hence, limited by the constitutional grants of power to regulate Indian affairs. *See* note 124 *supra*. Consideration of race has not been confined to implementing treaties with Indian nations, and may well be subject to the same restrictions for that purpose as for any other. *Cf.* Missouri v. Holland, 252 U.S. 416 (1920). Although federal control over United States possessions and over commerce with Indian tribes permits extensive regulation, this federal power should no more authorize racial distinctions than does the corresponding state power to regulate local commerce and local property.

142. *See* note 132 *supra*.

143. Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*, 71 YALE L.J. 1387, 1422 (1962).

responsive to Mr. Cohen's formulation.[144] And when race has had a decisive impact, that fact should invite skepticism over the merits of the decision rather than its easy application to another group. Finally, the value of these cases as constitutional precedent is greatly diluted by their peculiar surrounding circumstances. The events which led to the decisions, including treaties and physical conquests, have no parallel in the background of non-Indian groups; and since the cases antedate modern due process developments,[145] they did not face squarely the difficult questions inherent in racial classification.

V. Discriminatory Jury Selection

A more current illustration of the problems of classification by race may be found in the discriminatory selection of jurors in criminal proceedings.[146] The discussion of these problems will be divided into three segments, two dealing with the jury venire and the third with the peremptory challenge. In each situation the cases raise major issues of racial classification, although the courts usually have not viewed them in those terms.

A. *Arbitrary Selection of the Jury Venire*

Strauder v. West Virginia[147] was the earliest in a long series of jury exclusion cases. In that case, a Negro obtained review of the denial of several motions challenging the jury panel which convicted him of murder. A state statute provided that "All white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors . . . ."[148] The Supreme Court overturned the conviction, holding that the racial limitation in the statute operated to deny the defendant's right to equal protection:

> The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color . . . is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing

144. *See* notes 124-29 *supra* and accompanying text.

145. *See, e.g.*, Palko v. Connecticut, 302 U.S. 319 (1937).

146. Helpful discussions include Gillespie, *The Constitution and the All-White Jury*, 39 Ky. L.J. 65 (1950); Scott, *The Supreme Court's Control over State and Federal Criminal Juries*, 34 Iowa L. Rev. 577 (1949); Note, *The Congress, the Court and Jury Selection: A Critique of Titles I and II of the Civil Rights Bill of 1966*, 52 Va. L. Rev. 1069 (1966); Note, *The Defendant's Challenge to a Racial Criterion in Jury Selection: A Study in Standing, Due Process and Equal Protection*, 74 Yale L.J. 919 (1965).

147. 100 U.S. 303 (1879).

148. Quoted in 100 U.S. at 305.

> to individuals of the race that equal justice which the law aims to secure to all others.
> . . . It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy.[149]

The *Strauder* rule was quickly applied to the discriminatory administration of valid jury selection laws.[150] After the adoption of a realistic standard of proof,[151] the Court set aside the convictions of many Negroes who had been indicted or tried by a jury from which members of their race had been systematically excluded.[152] Although it has been suggested that these decisions were predicated either on a constitutional right to be tried by a jury drawn from a representative cross section of the community,[153] or on the statutory right of prospective jurors not to be excluded because of race, color, or previous condition of servitude,[154] neither theory has won acceptance. The latter view was discarded by *Hernandez v. Texas*[155] which held that the exclusion of persons of Mexican descent denied equal protection of the laws to a defendant member of the same class; the former was apparently rejected in *Fay v. New York*[156] which upheld the use of blue ribbon panels.[157] As a result, the basis for reversing convictions in jury selection cases remains obscure. Those reversals, however, could be founded on one of three beliefs: (1) that the exclusions operate to deny the defendant a fair trial; (2) that juries treat members of the excluded class more harshly than they do other defendants; or (3) that there is no other effective way to protect the right of minorities to participate in the administration of justice.

Whatever may be its rationale, *Strauder* would not have raised any notable problem of classification if it had announced a general rule that no criminal conviction can stand when obtained through a jury system from which artificial classes are systematically excluded. But that is not the rule which has been adopted so far. Instead, courts have repeatedly stated, without giving due regard to the serious

149. 100 U.S. at 308-09.
150. Neal v. Delaware, 103 U.S. 370 (1880).
151. *See* Norris v. Alabama, 294 U.S. 587 (1935).
152. *E.g.*, Arnold v. North Carolina, 376 U.S. 773 (1964); Eubanks v. Louisiana, 356 U.S. 584 (1958); Hill v. Texas, 316 U.S. 400 (1942).
153. Fay v. New York, 332 U.S. 261, 298 (1947) (dissenting opinion).
154. 18 U.S.C. § 243 (1964).
155. 347 U.S. 475 (1954).
156. 332 U.S. 261 (1947).
157. The cross section theory appeared again in Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966), *cert. denied*, 386 U.S. 991 (1967). *But see* Hoyt v. Florida, 368 U.S. 57 (1961).

implications of their statements, that an accused is entitled "to be indicted and tried by juries from which all members of *his* class are not systematically excluded . . . ."[158] This peculiar principle, termed the "same class rule," makes the defendant's affiliation with an artificial group crucial to the validity of his conviction. Consequently, when Negroes are excluded from the jury rolls, a criminal conviction will be subject to automatic reversal if the defendant is a Negro, but not if he is white or Indian. Such a rule has the ironic effect of classifying by race, even though its purpose is to remedy racial discrimination. Thus, it not only indicates the permissibility of racial classification in this area, but implicates the courts in that classification, since the same class rule was judicially created and is judicially applied.[159]

These implications cannot be avoided by suggesting that the jury cases reflect a rule of standing rather than one of substantive law. For if the defendant's right to litigate the issue of systematic exclusion of Negroes depends on what his own race happens to be, courts still will have engaged in differential treatment on the basis of race. Nor can the dilemma of the same class rule be resolved by reasoning that it classifies in terms of injury and that racial lines are merely coincidental. It is doubtful that black defendants are invariably harmed by the exclusion of blacks from the jury. In fact, there is considerable evidence that Negro defendants sometimes prefer to be tried by an all-white jury, especially in cases in which the victim was a Negro.[160] But more fundamentally, it simply cannot be main-

158. Hernandez v. Texas, 347 U.S. 475, 482 (1954) (emphasis added). To the same effect *see, e.g.*, Eubanks v. Louisiana, 356 U.S. 584, 585 (1958). All of the Supreme Court cases to date can be absorbed under the proposition that the arbitrary exclusion of a class denies equal protection to criminally accused members of that class.

159. The Supreme Court has not specifically endorsed the same class rule, although its practice over several decades of reversing only the convictions of members of the excluded class speaks a convincing language of its own. *See* Fay v. New York, 332 U.S. 261, 287 (1947), in which the Court noted the rule with apparent approval. *Compare* State v. Brunson, 227 N.C. 558, 43 S.E.2d 82 (1947), *rev'd*, 333 U.S. 851 (1948) (Negro defendant objecting to exclusion of Negroes), *with* State v. Koritz, 227 N.C. 552, 43 S.E.2d 77, *cert. denied*, 332 U.S. 768 (1947) (companion case presenting same objection by white defendant). The same class rule was developed by state courts in response to the demands of *Strauder* and its progeny. Since no greater demand has been indicated by the Supreme Court during the long history of the rule, it is not surprising to find local courts reluctant to upset criminal convictions outside the same class context. Alexander v. State, 160 Tex. Crim. 460, 274 S.W.2d 81, *cert. denied*, 348 U.S. 872 (1954) (white man cannot complain of the exclusion of Negroes from his jury); Haraway v. State, 203 Ark. 912, 159 S.W.2d 733 (1942) (Negro cannot complain of exclusion of whites). *Contra*, State v. Lowry, 263 N.C. 536, 544, 139 S.E.2d 870, 876 (1965).

160. *See* Swain v. Alabama, 380 U.S. 202, 225 (1965); Note, *Negro Defendants and Southern Lawyers: Review in Federal Habeas Corpus of Systematic Exclusion of Negroes from Juries*, 72 YALE L.J. 559, 569 (1963). *See also* H. KALVEN & H. ZEISEL, THE

tained that a defendant is prejudiced by arbitrary exclusions only if he is a member of the excluded class. The consequences of excluding Negroes may well be felt by defendants belonging to other minority groups such as Puerto Ricans, Indians, and even white civil rights workers. It is difficult, therefore, to resist the conclusion that the same class rule protects some defendants who have not been harmed, and fails to protect others who have been harmed—a conclusion which is inconsistent with the theory of classification by injury but compatible with that of judicial classification by race.

The racial tenor of the jury cases could be eliminated, of course, by repudiating the same class rule and making *Strauder* applicable to all defendants who show an arbitrary exclusion of any class.[161] However, the application of such a neutral rule would undermine vital public policies by opening large numbers of stale convictions to collateral attack.[162] If all persons convicted by juries drawn from an unconstitutional venire could collaterally challenge the panel, the drain on the judicial machinery would be heavy and many prisoners who had not been injured by the state's unlawful action might have to be released. Because of this potential disruption to the criminal law process, a racially neutral rule, if established at all, would almost certainly be applied only prospectively.[163] But a prospective approach would not eradicate the racial distinctions implicit in the same class rule; indeed, its purpose would be to preserve those distinctions for use in habeas corpus proceedings and possibly in pending appeals.

In view of the problems inherent in overturning the same class rule, courts may be more favorably disposed to modify it, as some writers have proposed, so that the arbitrary exclusion of a class could be challenged by nonmember defendants on a showing of "potential prejudice."[164] Such a modification, which could be applied retrospectively, would protect white civil rights workers and some minority group members against the exclusion of Negroes, but it would not place all defendants on an equal footing. Nonmembers

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AMERICAN JURY 339-43 (1966). This preference may reflect a hope of exploiting stereotypes of the "Negro subculture" or a fear that Negro jurors will conform to the views of the white majority and will arouse community racial feeling against the defendant. Those considerations reveal still deeper sources of injustice to the Negro, but they also indicate that an all-white jury is sometimes a safer risk for him than one that is racially mixed.

161. *See* Thiel v. Southern Pac. Co., 328 U.S. 217 (1946).

162. *See* Fay v. Noia, 372 U.S. 391 (1963); Brown v. Allen, 344 U.S. 443 (1953).

163. *Cf.* Johnson v. New Jersey, 384 U.S. 719 (1966); Linkletter v. Walker, 381 U.S. 618 (1965).

164. *See, e.g.*, Note, *The Congress, the Court and Jury Selection: A Critique of Titles I and II of the Civil Rights Bill of 1966*, 52 VA. L. REV. 1069, 1122 (1966).

of the excluded class could invoke *Strauder* only in situations in which potential prejudice was detectable. Yet our knowledge of jury behavior and group prejudice is so limited that error in applying the proposed rule seems inevitable.[165] On the other hand, a person showing membership in an arbitrarily excluded class is, without more, entitled to a new trial. Clearly a modification of the same class rule which requires nonmembers of an excluded class to assume risks of error which members do not assume will perpetuate differential treatment along group lines.

The principle of *Strauder* and its progeny appears, therefore, to leave little opportunity for the operation of a racially neutral standard. Those cases show that the government has power to classify by race outside the narrow context of wartime emergency and beyond the unique circumstances of United States-Indian relations.[166] The cases deal specifically with the administration of criminal justice, but the power they acknowledge is susceptible to wide application. The same class rule operates, when Negroes are excluded from jury service, to protect Negro defendants while denying the same protection to non-Negroes. Presumably the rationale for doing so is that there is a rough correlation between membership in the excluded class and probable harm at trial.[167] But if this imprecise correlation is sufficient to justify corrective racial classification in the administration of justice, then such classification may be arguably permissible in other areas in which there is an equally close relationship between injury and race. Of course, the same class rule relates only to the remedy provided for unlawful selection of the jury venire,[168] and the reasons for rejecting a racially neutral use of that remedy are compelling. It is doubtful, however, that these factors will make the teachings of the jury cases inapposite to other fields. Certainly racial classification in the public schools can be remedial, and rigid adherence to color-blindness can exact a heavy price in educational disadvantage.[169] On analysis, the jury cases seem to offer impressive support for corrective classification by race.

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165. *See* H. KALVEN & H. ZEISEL, *supra* note 160, at 465.

166. *See* text accompanying notes 56-86, 123-45 *supra*.

167. Some class members, according to this rationale, are not injured by the exclusions but most of them will be; and some nonmembers of the class may be harmed but most will not be.

168. The selection itself is governed by a requirement of strict racial neutrality. Cassell v. Texas, 339 U.S. 282 (1950); Akins v. Texas, 325 U.S. 398 (1945).

169. The action being remedied in the *Strauder* situation is unconstitutional, whereas racial isolation in the schools may be lawful, albeit undesirable. But it is difficult to read the Constitution to allow corrective racial classification in one case and not in the other so long as the government may in both circumstances regard the status quo as evil. Furthermore, the argument can be made that in each specific

B. *Proportional Representation*

The cases which attempt to delineate specifically the right to nondiscriminatory selection of the jury venire, unlike those providing a remedy for unlawful selection, do not imply the permissibility of classification by race. The most instructive decision, although it did not yield a majority opinion, is *Cassell v. Texas*.[170] In that case, a Negro convicted of murder accused the county jury commissioners of deliberately limiting Negroes selected to serve on each grand jury in proportion to the total number of blacks available for call. A majority of the Justices agreed that the county's jury-selection practices were unconstitutionally discriminatory. The prevailing opinion, written by Mr. Justice Reed for himself and three of his brethren, based its findings of discrimination on admission by commissioners that they chose jurors exclusively from among their acquaintances and that they knew no qualified Negroes. But the opinion was unequivocal in condemning proportional representation:

> If . . . commissioners should limit proportionally the number of Negroes selected for grand-jury service, such limitation would violate our Constitution . . . .
>
> . . . [T]he Constitution requires only a fair jury selected without regard to race. Obviously the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation. Similarly, since there can be no exclusion of Negroes as a race and no discrimination because of color, proportional limitation is not permissible.[171]

Mr. Justice Frankfurter, joined by two other Justices, concurred in judgment on the ground that "[t]he basis of selection cannot consciously take color into account."[172] There was thus general agreement in *Cassell* that there must be neither inclusion nor exclusion of veniremen because of race, and that states cannot purposefully "balance" the racial composition of juries.

The effect of *Cassell* on the issues posed by de facto school segregation will depend largely on the rationale of the *Strauder* case. If *Strauder* was based on the unfair or unequal treatment that members of the excluded class are thought to receive from other groups, *Cassell* will be a significant obstacle to the use of racial criteria in

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case, the classification relieves the consequences of unconstitutional action, even though with respect to the schools the relationship is diffuse and more remote in time. *See* note 37 *supra*.

170. 339 U.S. 282 (1950).
171. 339 U.S. at 286-87.
172. 339 U.S. at 295 (concurring opinion).

the schools. That interpretation of *Strauder* implies that jury representation for the defendant's class is conducive to evenhanded treatment; and if state contrivance to secure such representation is constitutionally proscribed in *Cassell*, notwithstanding the better brand of justice which balanced juries are presumed to dispense, similar efforts to control the racial composition of the schools may fail despite their potentially favorable effects.[173] On the other hand, *Cassell* will carry no such implication if the practice of reversing criminal convictions is merely an expeditious way to protect the minority's right to participate in the administration of justice, or if the process of discriminatory selection itself induces unequal treatment. Under those theories, proportional selection of jurors could have been forbidden simply because it did not advance the purpose of securing nondiscriminatory treatment for either the defendant or the prospective juror. Until the basis for *Strauder* is clarified, the impact of *Cassell* will remain uncertain.

C. *The Peremptory Challenge*

Swain v. Alabama[174] brought before the Court the difficult question whether a state's use of peremptory challenges to exclude Negroes from jury service violates the equal protection clause of the fourteenth amendment. In that case, Swain, a Negro, was tried by jury for rape of a seventeen-year-old white girl. In accordance with Alabama's system for selecting the petit jury, a list of approximately seventy-five veniremen was struck, twice by the defendant and once by the prosecutor in alternation, until twelve jurors were left. Six Negroes had been available, but they were struck by the prosecutor. An all-white jury then found Swain guilty, and he was sentenced to death. In the Supreme Court he contended that the state had unconstitutionally discriminated by race (1) in selecting grand jurors and the petit jury venire, (2) by purposefully striking six Negroes at his trial, and (3) by systematically exercising the strike over a period of years to prevent blacks from serving on the petit jury in any case. The first and third claims failed for lack of proof. The second was also rejected but not because the allegation of purposeful exclusion of Negroes was discredited.

173. The two situations, however, can be distinguished. One noteworthy difference is that racial manipulation may be immediately self-defeating in the courts where it draws attention to the defendant's race and away from the relevant facts, but corrective color-consciousness in the schools might not inhibit learning. In addition, a more persuasive factual case can be made to show the adverse effect of imbalance in education. *See* authorities cited in notes 160 *supra* and 245 and 248 *infra*. Nevertheless, it will not be easy to reckon with *Cassell* if *Strauder* is given this interpretation.

174. 380 U.S. 202 (1965).

The Court, addressing itself to the second claim through Mr. Justice White, readily acknowledged that the peremptory challenge often is "exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty."[175] The reasons for tolerating those considerations, it stated, were found in the policy of the peremptory system—to guarantee impartiality in appearance as well as fact:

> The function of the challenge is not to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. In this way the peremptory satisfies the rule that "to perform its high function in the best way 'justice must satisfy the appearance of justice.' "[176]

According to the Court, the purpose of the peremptory system would be frustrated if in a particular case state challenges based on unreasonable criteria were invalidated. Nevertheless, the Court preferred to speak in terms of presumptions and unreviewability, rather than to declare openly that prosecutors may use the challenge to secure an all-white jury:

> To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge . . . .
>
> In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes.[177]

The question whether or not a prosecutor can systematically strike all Negroes in every case was not presented by the record, but the Court stated that "in [such] circumstances, giving even the widest leeway to the operation of irrational but trial-related suspicions

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175. 380 U.S. at 220.
176. 380 U.S. at 219.
177. 380 U.S. at 221-22.

and antagonisms, it would appear that the purposes of the peremptory challenge are being perverted."[178]

The *Swain* decision clearly leaves the states free in particular cases to classify by race in exercising the peremptory challenge. Although the opinion speaks in terms of not subjecting the peremptory to the customary demands of equal protection, what that statement appears to mean is that the fourteenth amendment permits the purposeful challenge of Negroes and not as in the alien exclusion cases, that constitutional safeguards are inapplicable.[179] The rationale for allowing consideration of race in this situation is revealing. The Court at no time implied that a juror's race will affect his disposition of a case. Instead, the opinion suggested that some people believe racial factors to be significant, and evidently it is their beliefs which, in the interest of apparent impartiality, justify the purposeful exclusion of Negroes and members of other groups. Accordingly, *Swain* seems to permit racially differentiated treatment to be predicated on community attitudes which are, by hypothesis, unreasonable. In view of the limited state interests at stake there,[180] the *Swain* case may lend support to the use of racial classifications in other areas, including education, in which community attitudes have an important effect and in which injustice is not merely apparent but real.[181]

To be sure, *Swain* involved a narrow issue which has traditionally been immune from judicial review. But tradition furnishes no adequate basis for determining the constitutionality of racial classifications. The *Swain* Court, aware of the potential for abusing

178. 380 U.S. at 223-24.

179. The Court did not discuss, and at times seemed consciously to obscure, the distinction between holding that the challenge is constitutionally permissible, and holding that it is impermissible in principle but insulated from inquiry in order to protect the peremptory system. A close reading of *Swain*, however, suggests that the purposeful challenge of Negroes is lawful, rather than undetectably lawless. The Court recognized that prosecutors often consider the racial affiliations of prospective jurors and did not intimate that this consideration was at all improper. It must have been expected that silence in this context would be understood as permissive. Moreover, the testimony of the prosecuting attorney in *Swain* made it plain that he himself did not disregard race in exercising the peremptory. Record at 21-22. His testimony can be reconciled with the Court's inference that the challenge was properly used, but the explanation must be that purposeful class exclusion is allowable when the challenge is "trial-related." *See* 380 U.S. at 225; note 184 *infra*.

180. Even with respect to the defendant "There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges . . . ." Stilson v. United States, 250 U.S. 583, 586 (1919), quoted with approval in *Swain*, 380 U.S. at 219.

181. The school system is not intended, like the peremptory, to permit official irrationality. But if equal protection requirements can be relaxed to allow irrational trial-related considerations in the courts, many will urge a similar result for rational school-related considerations in education. *See* note 173 *supra*.

the peremptory, indicated a readiness to strike down the systematic challenge of Negroes when that challenge is used in a series of cases in the same jurisdiction.[182] Its refusal to make corresponding demands in a specific case did not stem from any difference in tradition, since the challenge has generally been insulated from review when it is used in a series of cases as well as when it is used in particular ones.[183] The difference turns rather on the Court's current appraisal of the proper role of the peremptory in judicial administration. The Court apparently will bar the systematic use of the challenge to evade *Strauder*, but is not prepared to invalidate the peremptory system in order to foreclose racial limitations on jury service. This value judgment qualifies the principle of color-blindness and produces the type of accommodation of interests which many will consider appropriate in other fields.[184]

VI. Cohabitation and Miscegenation

The Court has discussed the question of permissible classification by race in its recent decisions concerning cohabitation and miscegenation laws. In *McLaughlin v. Florida*,[185] the defendants, a black man and a white woman, were charged with habitually occupying the same room in violation of a Florida statute which prohibited the interracial cohabitation of unmarried couples. They moved to quash the information on the ground that the statutory provision denied them the equal protection guaranteed by the fourteenth amendment. The state defended the statute as a means of dealing with promiscuity and of complementing its miscegenation law. On review the Supreme Court accepted the state's characterization of the statute and assumed *arguendo* that the miscegenation law was valid; it also agreed that the cohabitation of unmarried couples could be barred by a properly drawn prohibition. The principal question therefore was whether

182. 380 U.S. at 223-24.

183. The peremptory challenge, when available, has usually been deemed an absolute power. *See* Lewis v. United States, 146 U.S. 370, 378 (1892); Hayes v. Missouri, 120 U.S. 68 (1887). *See also* F. Busch, Law and Tactics in Jury Trials 196 (1949).

184. There are obvious differences between the peremptory challenge concept, which expresses a special regard for appearances, and other uses of racial classification. *See* note 181 *supra*. But if preservation of the peremptory system justifies the acceptance of racial disqualifications, it must be asked whether other interests, which are entitled to at least equally high rank, might not also support classification by race. Furthermore, *Swain* indicated approval, not mere tolerance, of some racially predicated challenges, such as the practice in which "striking is done differently depending on the race of the defendant and the victim of the crime." 380 U.S. 202, 225 (1965). *See* note 179 *supra*.

185. 379 U.S. 184 (1964).

state power, which might validly reach all premarital cohabitation, could be exercised solely against interracial cohabitation.

Mr. Justice White, writing for the Court, stated initially:

> Normally, the widest discretion is allowed the legislative judgment in determining whether to attack some, rather than all, of the manifestations of the evil aimed at; and normally that judgment is given the benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary and invidious . . . . But we deal here with a classification based upon the race of the participants, which must be viewed in the light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States.[186]

In light of that statement, the state's first line of defense for the statute fell easily. Although the Court conceded that the provision protected Florida's concern for moral customs, the state had not urged that promiscuous conduct was more likely to result if the cohabiting couple was racially mixed rather than racially homogeneous, and the Court could find "no legislative conviction that promiscuity by the interracial couple presents any particular problems requiring separate or different treatment . . . ."[187] Thus, the Court had no difficulty in answering in the negative its central inquiry as to whether there was "some overriding statutory purpose requiring the proscription of the specified conduct when engaged in by a white person and a Negro, but not otherwise."[188]

The state's second line of defense fared no better. The Court recognized that the statute was rationally related to the state's miscegenation policy, but again a stringent test of constitutionality was invoked:

> There is involved here an exercise of the state police power which trenches upon the constitutionally protected freedom from invidious official discrimination based on race. Such a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification, as we have said, and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy.[189]

Because the integrity of Florida's marriage laws could be protected

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186. 379 U.S. at 191-92.

187. 379 U.S. at 193.

188. 379 U.S. at 192. The assumption implicit in Pace v. Alabama, 106 U.S. 583 (1882), that equal protection requirements are met when all members of a regulated class are treated alike, was expressly repudiated.

189. 379 U.S. at 196.

by enforcing racially neutral bans on illicit intercourse, there was no "necessity" for the provision at issue.[190]

The negative implication of *McLaughlin* is that states may classify by race when this is necessary for a legitimate overriding purpose. Understandably, the case has been viewed as supporting the use of racial criteria to attack de facto segregation. Writers have urged that *McLaughlin* enables the schools to classify racially for the purpose of correcting imbalance,[191] and one court has declared broadly that racial classification in the schools satisfies whatever burden of justification is required.[192]

This plausible application of *McLaughlin*, however, overlooks the essential ambiguity of Mr. Justice White's opinion. It is not self-evident that classification by race will serve an "overriding" purpose in the schools.[193] The objections of some blacks to integrated education and the costs involved in achieving integration through racially based measures should caution against a facile response to competing claims.[194] Nor is it clear that such measures will qualify as "necessary." The latter term has been narrowly construed in other areas in which it measures fundamental rights.[195] Furthermore, some progress in reducing imbalance can be realized through racially neutral remedies, and *McLaughlin* does not state that racial classifications may be employed to advance an objective which is

190. Justice Stewart, joined by Justice Douglas, concurred on the ground that "it is simply not possible for a *state* law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor." 379 U.S. at 198 (emphasis added). The careful omission of any reference to federal power may have been intended to accommodate the *Japanese Relocation Cases* in which Justice Douglas voted with the Court. But if federal law making criminality turn on race is sometimes valid, it is not as "simple" as the opinion implies to condemn state laws in such universal terms.

191. Carter, *De Facto School Segregation: An Examination of the Legal and Constitutional Questions Presented*, 16 W. RES. L. REV. 502 (1965).

192. Springfield School Comm. v. Barksdale, 348 F.2d 261 (1st Cir. 1965).

193. "This higher burden requires that a state show . . . that the public interest involved outweighs the detriments that will be incurred by the affected private parties. In calculating the magnitude of the public need for the measure, the courts must consider both the extent of the benefits accruing to society and the degree of risk which will be incurred if a measure of that nature is not permitted. Similarly, the actual costs of the measure must be determined by examining both the importance of the individual or group rights infringed and the extent to which the measure will have long-term adverse effects on those interests." *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1067, 1103 (1969).

194. For a description of some of these costs *see* notes 252, 279, and 298 *infra*. It has also been argued that quality education might be better achieved by improving de facto segregated schools than by integrating the races. *See* J. CONANT, SLUMS AND SUBURBS 27-32 (1961). The views of educators have undergone some change as the effects of racial imbalance have become more fully understood, but there is still much debate over the relative advantages of various ways to equalize educational opportunity.

195. *See generally* Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254 (1964).

partially attainable in other ways. The necessity test suggests that race cannot be made a classifying trait if other standards will eliminate imbalance. But the test does not indicate whether racial classifications may be utilized to achieve a better balance, and in most circumstances that is the critical issue.[196]

Reliance upon *McLaughlin* is also called into question by the fact that the Court actually applied the restriction against classification by race far more rigorously in that case than it had in the past. Earlier opinions characterized racial distinctions as "suspect" and subject to "rigid scrutiny."[197] But those generalities had neither foreclosed all racial lines nor confined their use to situations in which alternative measures were certain to fail. The close review in *McLaughlin* is especially revealing in light of the state's undisputed power to proscribe premarital cohabitation. The objection to the Florida statute was based solely on its underinclusiveness, a defect that is ordinarily subject to "the widest discretion."[198] Since the miscegenation provision was assumed to be valid, the usual requirement that an underinclusive classification be supported by fair reasons might have been met in the case of interracial cohabitation. Under that assumption, the state could well have concluded that the risks of illegitimacy involved in the cohabitation of couples who are prohibited from intermarrying call for special treatment. Moreover, if the miscegenation law is accepted as valid, racially mixed couples might be treated differently for whatever reasons underlie that law. These considerations could not save the cohabitation statute and did not require full examination of the miscegenation issue but only because the Court applied so stringent a standard to test the classification. Adoption of such a restricted view of permissible classification by race cannot easily be reconciled with the nation of increased tolerance for racial lines.

The questions concerning the constitutionality of miscegenation laws, which *McLaughlin* purported to reserve, were answered in sweeping terms by *Loving v. Virginia*.[199] The Lovings, a white man and a black woman, were married in the District of Columbia and shortly thereafter made their home in Virginia, where both had been residents immediately before the marriage. They were indicted on charges of violating a Virginia statute which read:

196. It might be possible to invoke *McLaughlin* by defining the objective in terms of changing the Negro-white ratio by some precise percentage, but the fictive quality of that approach is transparent.

197. Bolling v. Sharpe, 347 U.S. 497 (1954); Korematsu v. United States, 323 U.S. 214 (1949).

198. 379 U.S. 184, 191 (1964).

199. 388 U.S. 1 (1967).

> If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in [this state's anti-miscegenation statute], and the marriage shall be governed by the same law as if it had been solemnized in this State.[200]

The miscegenation law cited in this statute prohibited the intermarriage of any "white person" with any "colored person."[201] The defendants were sentenced on pleas of guilty to a year in jail, but the sentences were suspended for twenty-five years on the condition that they leave the state and not return during that period of time. Four years later the Lovings filed a motion to vacate judgment on grounds that the Virginia statutes denied them due process and equal protection, and ultimately the issues were taken to the Supreme Court.

Chief Justice Warren's opinion for the Court, relying heavily on the *McLaughlin* case, disposed of those issues and of all miscegenation laws in a few paragraphs. In the Court's view, the fact that the statutes restricted freedom of whites as well as of blacks was insufficient to satisfy the demands of equal protection since the provisions classified racially. Classification by race, the Court implied, may be unconstitutional per se:

> At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny" . . . and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.[202]

As in the *School Segregation Cases,* the legislative history of the fourteenth amendment was found to be "inconclusive." But unlike *Brown,* the *Loving* opinion made no use of available social science evidence. Instead the Court brusquely announced that miscegenation laws are constitutionally unjustified:

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200. VA. CODE ANN. § 20-58 (1960), *repealed,* Act of April 2, 1968, ch. 318, § 2, [1968] Acts of Assembly 428.

201. The latter term was defined by the statutes as a person "in whom there is ascertainable any Negro blood," VA. CODE ANN. § 1-14 (1966), and the former as one having "no trace whatever of any blood other than Caucasian." VA. CODE ANN. § 20-54 (1960). But persons having "one-sixteenth or less of the blood of the American Indian and having no other non-Caucasic blood" were deemed "white," and those having "one-fourth or more of Indian blood and less than one-sixteenth of Negro blood" were deemed tribal Indians. VA. CODE ANN. § 1-14 (1966).

202. 388 U.S. 1, 11 (1967). The word "they" seems to refer to all racial classifications rather than only to those incorporated in criminal statutes.

> There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia only prohibits interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy . . . . There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.[203]

Such laws, the Chief Justice added, also abridge the liberty secured by the due process clause.

Whatever importance *Loving* may have in destroying a symbol of racial separateness, it contributes relatively little toward resolving issues of classification by race. The Court's reference to a per se rule is unlikely to have any appreciable impact in the face of contrary precedent and in the absence of reasoned discussion. Aside from that reference, *Loving* merely reiterates the *McLaughlin* standard without amplifying it. As might be expected, the application of this flexible formula yielded appealing results in the immediate case, but offered scant guidance for the future.[204] Indeed, since the Court identified the disputed classification with a design to maintain white supremacy, the decision offers virtually no guidance at all for cases involving "non-invidious" uses of racial criteria.

VII. Encouraging and Discouraging Private Discrimination

A. *Anti-Discrimination Laws*

Federal and state anti-discrimination laws, which bear tangentially on the question of permissible classification by race, have consistently been upheld by the Supreme Court. The leading case is

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203. 388 U.S. at 11-12. The Court expressly disclaimed any reliance on Virginia's failure to extend the miscegenation bar to nonwhites, and it ruled the statutes invalid "even assuming an even-handed state purpose to protect the 'integrity' of all races." 388 U.S. at 11 n.11.

204. The adaptability of *McLaughlin* is illustrated by the number of options available to the Court in overturning the convictions in *Loving*. The Court could have struck down Virginia's evasion statute without passing on the miscegenation law, exactly as *McLaughlin* had done, since a racially neutral provision operating against all couples ineligible to marry in Virginia would fully protect state interests. Alternatively, the Court could have held that Virginia's miscegenation law, which prohibited only miscegenetic marragies involving whites, served no legitimate purpose because it did not "protect" other races or because such protection is not a proper governmental function. The latter rationale would have required the Court to deal with conflicting expert opinion on whether the effects of psychological pressures on miscegenetic families justify regulations; the former would have reached only the Virginia statutes. By drawing an easy inference that miscegenation laws do not serve an "overriding" purpose, the Court managed both to address itself to miscegenation laws in general and to avoid a full discussion of the interests they allegedly safeguarded.

Railway Mail Association v. Corsi.[205] At issue in that case was the validity of a state statute which prohibited labor unions from denying membership to any person because of race, color, or creed. A New York City branch of a postal clerks' organization sought a declaration that the statute infringed rights of due process guaranteed by the fourteenth amendment. The Court easily rejected that contention:

> A judicial determination that such legislation violated the Fourteenth Amendment would be a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color. We see no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race, color or creed by an organization, functioning under the protection of the state, which holds itself out to represent the general business needs of employees.[206]

Since *Corsi* involved a government employer and a metropolitan branch of the union, it was to be expected that the decision would result either in desegregating or in dismantling the organization.[207] The case thus indicates that a ban on private discrimination which has the probable effect of compelling desegregation, and thereby restricting the associational freedom of those who would otherwise discriminate, is constitutionally valid.[208] Nevertheless, *Corsi* should not be read for the broad proposition that states may force private groups—and a fortiori, the public schools—to integrate. Such an interpretation confuses nondiscrimination, which the New York statute required, with integration, which the statute might have achieved but did not command. Anti-discrimination laws are entirely consistent with governmental neutrality toward integration,[209] and the cases sustaining them do not control the validity of measures to correct imbalance through racial classification. The statutes classify racially only in the sense that they single out race as an impermissible basis for private discrimination, while leaving other arbitrary

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205. 326 U.S. 88 (1945).

206. 326 U.S. at 93-94.

207. *See* Colorado Anti-Discrimination Commn. v. Continental Air Lines, Inc., 372 U.S. 714, 721 (1963) (declaring official job discrimination to be unconstitutional).

208. To the same effect *see* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), and cases cited therein.

209. The primary purpose of an anti-discrimination policy is to promote equal opportunity; the effect of the policy on racial interaction, even assuming full enforcement, will vary. Often nondiscrimination produces integration, but occasionally it may inhibit efforts to integrate. *Cf.* Hughes v. Superior Court, 339 U.S. 460 (1950), which upheld a state court injunction against picketing for the purpose of inducing an employer to hire Negro workers in proportion to Negro customers.

differentiation unregulated. This distinction, however, presents no serious classification problem.

B. *Official Designation of Race*

Unlike anti-discrimination laws, racial designations raise substantial constitutional problems in a variety of fields. The post-*Brown* Court first encountered this issue in *Anderson v. Martin.*[210] In that case two Negro candidates for the school board in East Baton Rouge, Louisiana, sought an injunction against the enforcement of a state statute requiring that all nomination papers and ballots in public elections indicate the race of each candidate. Characterizing the purpose of the statute as "purely racial," the Supreme Court rejected an attempt to justify the provision as a means of informing the electorate: "We see no relevance in the State's pointing up the race of the candidate as bearing upon his qualifications for office."[211] The Court held unanimously that the compulsory designation of race on the ballot was repugnant to the equal protection clause of the fourteenth amendment:

> [B]y placing a label on a candidate at the most crucial stage in the electoral process—the instant before the vote is cast—the State furnishes a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another . . . . Hence, in a State or voting district where Negroes predominate, that race is likely to be favored by a racial designation on the ballot, while in those communities where other races are in the majority, they may be preferred. The vice lies not in the resulting injury but in the placing of the power of the State behind a racial classification that induces racial prejudice at the polls.[212]

The Supreme Court's decision in *Anderson,* however, should be considered together with its holding in *Tancil v. Woolls.*[213] The plaintiffs in the latter case sought declaratory and injunctive relief against the enforcement of several Virginia statutes which required public officials to designate race on certain records and to separate some listings racially. A three-judge federal district court struck down provisions calling for notations of race and for racially separated entries on voting and property records:

> [T]hey serve no other purpose than to classify and distinguish official

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210. 375 U.S. 399 (1964).

211. 375 U.S. at 403.

212. 375 U.S. at 402.

213. 379 U.S. 19 (1964), *aff'g* Hamm v. Virginia State Bd. of Elections, 230 F. Supp. 156 (E.D. Va. 1964) (per curiam).

> records on the basis of race or color . . . . The infirmity of the provisions . . . lies in their mandate of *separation* of names by race.[214]

It upheld a statute directing that every decree of divorce recite the race of the parties, stating that "[v]ital statistics, obviously, are aided"[215] thereby. The controlling principle was expressed in terms of the legislative purpose:

> Of course, the designation of race, just as sex or religious denominations, may in certain records serve a useful purpose, and the procurement and compilation of such information by State authorities cannot be outlawed per se. For example, the securing and chronicling of racial data for identification or statistical use violates no constitutional privilege. If the purpose is legitimate, the reason justifiable, then no infringement results.[216]

But the district court evaded the most interesting question in the case when it declined to apply this rule to the racial designations, without more, on voting and property records. Since those notations would have aided vital statistics no less than the notations on divorce decrees, but were far more susceptible to misuse, they presented a crucial test for the court's general principle. Rather than meet that test, the court read the designation provisions in conjunction with other sections of the Virginia Code which called for separate listings of whites and Negroes.[217] So viewed, the provisions were infected by a "mandate of separation" and were held unenforceable insofar as they required officials "to note and show separately the names of . . . white or colored persons."[218] In the Supreme Court the judgment was affirmed without opinion or citation of authority.[219]

Tancil and *Anderson* offer few fresh insights into the question of permissible classification by race. The racial classifications in these cases, unlike the classifications in the several lines of decisions considered above, did not impose racially differentiated treatment on

214. Hamm v. Virginia State Bd. of Elections, 230 F. Supp. 156, 158 (E.D. Va. 1964) (court's emphasis).

215. 230 F. Supp. at 158.

216. 230 F. Supp. at 158.

217. Section 58-790 of the Virginia Code, directing assessors to note race, was treated together with § 58-804, requiring the Department of Taxation to maintain separate land books. Section 24-118, authorizing counties to keep voter registration lists on serially numbered cards or loose leaf binders with different colored sheets for whites and Negroes, was invalidated even though it seemed to incorporate only racial designations. Perhaps this requirement was deemed to be tainted by § 24-28 which required the State Board of Elections to maintain racially separated lists. These provisions are now found in VA. CODE ANN. §§ 24-28, 24-118, 58-790, 58-804 (1969).

218. Quoted from the final order of the court in 9 RACE REL. L. REP. 919, 921 (1964).

219. 379 U.S. 19 (1964) (per curiam).

any person.[220] But although the state's action did not vary with the race of the individual, there was a danger that the notations on the ballot might encourage racially differentiated action by voters. The decision in the *Anderson* case afforded the traditional protection against this official involvement in racial discrimination. The Supreme Court ruled that the validity of the statute did not depend on which race was disadvantaged, and that the states should not use race as a shorthand indicator of other factors, such as personal beliefs and experience, which are themselves quite relevant. *Tancil*, on the other hand, held that the notation on divorce decrees was a valid racial classification. That case may provide authority for state decisions requiring school officials to conduct a racial census,[221] although even that prospect is uncertain in view of the Supreme Court's ambiguous disposition of Virginia's other race notations. In any event, the validity of corrective action in the schools is not illuminated by a judgment sustaining only the collection of some data.

It is possible that greater significance will emerge from these cases when the basis for the result in *Tancil* is explained.[222] For the present, there is clarity only at two extremes: racial designations are prohibited on the ballot, where they threaten serious harm; and they are allowable on divorce decrees, where they serve legitimate state aims. In many situations, however, race notations will be both useful and threatening. For example, governmental power to gather racial data is vital to the integrity of anti-discrimination laws,[223] and the exercise of such a power was apparently contemplated by the Civil Rights Act of 1964.[224] Yet the same data which help an official enforcement agency to detect discrimination may sometimes aid

220. *See* notes 263-97 *infra* regarding the distinction between racially differentiated treatment of individuals and other types of racial classifications.

221. School Comm. of New Bedford v. Commissioner of Educ., 349 Mass. 410, 208 N.E.2d 814 (1965). For a case sustaining such a census in the context of de jure segregation, *see* Lee v. Macon County Bd. of Educ., 267 F. Supp. 458 (M.D. Ala.), *aff'd per curiam sub nom.* Wallace v. United States, 389 U.S. 215 (1967).

222. *Tancil v. Woolls* is a classic example of what should not be decided per curiam. There is no way of knowing whether the Supreme Court's action meant that the racial designations on voting and property records were unconstitutional or whether it meant that, as the lower court had decided, the records were unlawfully segregated. And if the designations themselves were invalid, there is no way of knowing why. The district court measured the validity of official race notations by the legitimacy and justifiability of their purpose, a test similar to that later adopted in the *McLaughlin* case. But there is little discernable difference in purpose between noting race on a divorce decree and noting it on various other records. A test drawn in these terms, like the distinction between direct and indirect legal effects, may serve the function "of stating, rather than of reaching, a result." Wickard v. Filburn, 317 U.S. 111, 123 (1942).

223. *See* M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 125-27 (1966).

224. 42 U.S.C. § 2000e-8(c) (1964). *See* M. SOVERN, *supra* note 223, at 85-89.

private employers who wish to practice it.[225] Under these circumstances it is a fair guess that, while safeguards will have to be developed, they will not take the form of a complete ban on the collection of racial information. But since no compromise can entirely prevent misuse of the data,[226] this problem illustrates the need for flexibility even when racial classifications carry some risk.

VIII. Percentage Requirements in School Desegregation

In *United States v. Montgomery County Board of Education*[227] the Supreme Court approved for the first time the use of percentage requirements in disestablishing de jure segregated school systems. That case, the latest in a series of decisions implementing *Brown*, involved the assignment of faculty and staff members in Montgomery County, Alabama. Suit was originally filed in a federal district court in 1964, and findings were entered which showed that teachers as well as students were assigned to local schools strictly on the basis of race. After issuing a number of orders for desegregation of the student body, the federal court directed the school board to end faculty segregation in the 1966 academic year.[228] Nevertheless, in 1968 when motions were heard which culminated in the order which was reviewed by the Supreme Court, the district judge found extensive evidence of continued discriminatory practices. New schools had been constructed, existing schools expanded, and transportation and athletic programs maintained in a manner wholly calculated to perpetuate the dual system of education. With respect to faculty and staff assignments—the only aspect of the dispute to reach the Supreme Court—the evidence of willful segregation was unmistakable. Negro substitute teachers had been employed more than 1,500 times during the previous semester and in every instance had been assigned to traditionally Negro schools; white substitutes had been employed more than 2,000 times, with only token assignments to nonwhite schools. The pattern for night school and for student and full-time teaching staffs was much the same. In all, about 1,365 teachers served

225. This is especially true when the employer engages in quota hiring in order to protect himself against a charge of discrimination. *See* Winter, *Improving the Economic Status of Negroes Through Laws Against Discrimination: A Reply to Professor Sovern*, 34 U. Chi. L. Rev. 817 (1967).

226. Those who believe that the principal danger lies in state and local collection of racial data may seek refuge in the doctrine of pre-emption, at least so far as employment records are concerned. The inevitable cost of doing so will be the diminished effectiveness of state anti-discrimination laws.

227. 395 U.S. 225 (1969).

228. The board was later allowed one more year for compliance. A detailed factual account of the *Montgomery County* litigation may be found in the memorandum opinion of the district court. 289 F. Supp. 647 (M.D. Ala. 1968).

in Montgomery County, and approximately 1,333 were assigned to faculties composed predominantly of members of their own race.

Against the background of this response to the general mandate for desegregation, the district judge "concluded that a more specific order would be appropriate . . . to establish the minimum amount of progress that would be required for the future."[229] He therefore announced an "ultimate objective in faculty desegregation" calling for the ratio of white to Negro teachers, then about 3 to 2 for the system as a whole, to be "substantially the same" in each school. To begin implementing this goal, he ordered that the following year at least one-sixth of the regular teachers and staff in each school be members of their faculty's racial minority, although schools with fewer than twelve teachers were required to have only one or more members of the minority race. The ratio of white to black substitute, night, and student teachers was to be substantially the same in each school. On review, the court of appeals agreed that the school board had failed to comply with general orders to desegregate the faculty and that there was "a need for specific directives in the instant case,"[230] but it modified some of the ratios adopted by the district judge.

The Supreme Court characterized the issues between the parties, which reflected the differences in the lower court orders, as "exceedingly narrow" and resolved them virtually without legal discussion. The Court made passing references to the school board's "responsibility to achieve integration as rapidly as practicable"[231] and stressed that the ratios in question were not intended to be rigid and inflexible. It then stated that the order of the district judge would "expedite, by means of specific commands, the day when a completely unified, unitary, nondiscriminatory school system becomes a reality instead of a hope."[232] With that observation, it remanded the case to the Fifth Circuit and directed that the judgment of the district court be affirmed.

There are obvious aspects of color-consciousness in the *Montgomery County* case,[233] but, contrary to some impressions carried in the popular press,[234] the decision does not validate the allocation of government jobs or of any other official benefit on the basis of

229. 395 U.S. 225, 232 (1969).
230. 400 F.2d 1, 6 (5th Cir. 1968).
231. 395 U.S. 225, 230 (1969). *But see* text accompanying notes 27-30 *supra*. Previous cases had identified the goal somewhat more vaguely as a "unitary" school system. Green v. County School Bd., 391 U.S. 430 (1968).
232. 395 U.S. 225, 235 (1969).
233. *See* note 237 *infra*.
234. TIME, June 13, 1969, at 66.

race. Both the district court and the Supreme Court defended the use of ratios as a means of assuring desegregation through more specific orders, and neither intimated that teachers would be subjected to racially differentiated treatment. The history of the *Montgomery County* litigation attested to the inadequacy of general mandates; in fact, some school officials had themselves indicated a need for more precise instructions. The use of ratios in these circumstances followed the course taken by the Fifth Circuit a year earlier when it accepted the *Guidelines* of the Department of Health, Education, and Welfare as "a general rule of thumb or objective administrative guide for measuring progress in desegregation . . . ."[235] The ratios, like the *Guidelines*, were designed to induce compliance with *Brown* and not to legitimate the discriminatory allotment of official benefits or burdens. This point was made clear, not only by the repeated insistence in the *Montgomery County* opinions that the ratios specifically define rather than modify *Brown II's* mandate for a "nondiscriminatory school system," but also by other features of the district court's desegregation plan. For that plan required unequivocally that potential burdens, such as the displacements of teachers, be administered on a nonracial basis:

> Teachers and other professional staff members will not be discriminatorily assigned, dismissed, demoted, or passed over for retention, promotion, or rehiring, on the ground of race or color . . . . If, as a result of desegregation, there is to be a reduction in the total professional staff of the school system, the qualifications of all staff members in the system will be evaluated in selecting the staff member to be released without consideration of race or color.[236]

In this connection, it is crucial to recognize that all of the court's ratio requirements can be satisfied through a *racially neutral* assignment of school personnel. Since 60 per cent of the county's teachers are white and 40 per cent are black, compliance with the order for a minimum minority ratio of one-in-six among the regular faculty can surely be effected without subjecting teachers to racially differentiated treatment. Indeed, the laws of probability make it difficult not to attain that ratio if teaching assignments are genuinely nonracial. And the laws of probability likewise demonstrate that racially neutral action can produce "substantially the same" ratio of white to black substitute, night, and student teachers in each school.[237] What

235. United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 886-87 (1966), *aff'd en banc*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967).

236. 12 RACE REL. L. REP. 1200, 1205-06 (1967).

237. "Racially neutral action" refers to treatment of teachers. This term, however, does not imply a school policy which is "neutral" in the sense of being indifferent to the racial composition of various faculties. For example, a random assignment plan and

Montgomery County requires therefore is that the school board stop its discriminatory practices, not that it initiate new ones.

It is conceivable, of course, that the future use of ratios in dismantling dual school systems may involve differential treatment based on race. If ratios become "rigid and inflexible"—qualities which the Supreme Court took pains to note were absent in *Montgomery County*—they may be unattainable by neutral means. Attempts will probably then be made to distinguish between imposing racially focused burdens as a corrective for de jure segregation and imposing them for other reasons.[238] The pressure to adopt this rationale and to prescribe more severe ratios will be intense so long as the promise of the school cases remains unfulfilled. Whether local intransigence will persuade the Supreme Court to order racially differentiated treatment of students and teachers in a final effort to implement *Brown* cannot be prophesied, but that step was not taken in the *Montgomery County* case.

IX. General Policy Considerations

The discussion above shows that the decisions of the Supreme Court do not establish a rigid principle of constitutional color-

a free choice plan might both be racially neutral toward teachers; but if the school board chose between those plans, it would have to be mindful of their comparative impact on segregation. There is thus an important element of color-consciousness in *Montgomery County*, an element which is implicit in any affirmative effort to desegregate. But there are vast differences between achieving desegregation through racially differentiated burdens and achieving it through the uniform treatment of all races. *See* United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 876 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967), on which the trial judge in the instant case placed heavy reliance, which stated that "a classification that denies a benefit, causes harm, or imposes a burden must not be based on race." To the extent that attacks on imbalance in northern schools involve racially predicated burdens, as they often do, the *Montgomery County* case is readily distinguishable. *See* note 262 *infra* regarding other color-conscious attempts to alleviate imbalance.

The Montgomery County Board of Education will have considerable latitude in selecting faculty desegregation measures, since the dual school system must have produced both white and black teachers for each grade and for each subject. The Board is unlikely to resort to completely random assignment, although this would yield the required results; but other racially neutral measures, including random assignment of the teachers with lowest seniority, could be highly effective. The Board's own plans, in fact, contemplated nearly as much integration as is now required, 289 F. Supp. 647, 658 (M.D. Ala. 1968), despite an apparent policy of retaining most teachers in their present schools—a policy which cannot be deemed nonracial since it acquiesces in past discriminatory appointments.

238. The judicial supervision exercised over the disestablishment of dual school systems has been advanced as a basis for distinguishing. *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1067, 1108-09 n.192 (1969). The flexible standard set forth in McLaughlin v. Florida, 379 U.S. 184 (1964), might also be used to accommodate the distinction. *See* notes 185-96 *supra* and accompanying text. And finally, *Montgomery County* may quite possibly be read for more than it is worth. For an analysis of racially differentiated treatment outside the context of de jure segregation *see* notes 263-90 *infra* and accompanying text.

blindness. Rather, the opinions, although not yielding a clear neutral principle, suggest that in appropriate circumstances—usually described in terms of "justification"—the state and national governments may classify by race. The value of the cases as precedent for such classification in de facto segregated schools is varied; but even if the decisions were more uniformly apposite, policy considerations would inevitably affect the ultimate disposition of the problem. The remainder of this Article will therefore deal with some of those considerations.[239] It will focus on the validity of purposeful integration in principle and on the ways in which that objective may be advanced.[240] A concluding section will examine black separatism as an alternative route to educational equality.

A. *Purposeful School Integration in Principle*

The threshold question is whether or not the racial composition of the schools is a valid governmental concern. A negative answer to that question, unlike a ruling that particular measures are improper because they intrude on constitutionally protected rights, would deliver a fatal blow to all conscious efforts to integrate de facto segregated schools. The issue requires discussion of the effects of racial and social class isolation on student attitudes and achievement, as well as a consideration of specific objections to purposeful integration in principle.

Correction of imbalance in the public schools will produce both racial interaction and social class interaction, and recent studies have documented the favorable effects of those contacts. The *Coleman Report*,[241] prepared for the Office of Education in response to a Congressional mandate for a national survey of educational opportunity, found that pupil achievement varies directly with the social class level of the student body. It concluded:

> Attributes of other students account for far more variation in the

239. These factors are crucial not only because of their impact on education but also because of their potential applicability to racial classifications in other areas, including employment and housing. Federal power to enforce the fourteenth amendment in these fields is extensive under Katzenbach v. Morgan, 384 U.S. 641 (1966), but that case did not remove the restraints on official classification by race. *But cf. Developments*, *supra* note 238, at 1109-11.

240. The term "purposeful integration" refers to action that has the purpose and effect of producing racial balance, as distinguished from action which achieves a fortuitous balance but which is adopted to effectuate nonracial policies. If integration is an allowable state goal—that is, permissible "in principle"—debate will then center on methods of implementation.

241. U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, OFFICE OF EDUCATION, EQUALITY OF EDUCATIONAL OPPORTUNITY (J. Coleman ed. 1966) [hereinafter COLEMAN REPORT].

> achievement of minority group children than do any attributes of school facilities and slightly more than do attributes of staff.
>
> In general, as the educational aspirations and backgrounds of fellow students increase, the achievement of minority group children increases.[242]

Furthermore the higher achievement of minority group children in schools with a higher social class level is not offset by commensurate disadvantage to the more privileged students;[243] rather, it appears that "in a school containing a mixture of lower and middle class children the total educational product is greater than if the classes were segregated."[244] The evidence in the *Report*, together with corroborative data gathered in other investigations,[245] is more than adequate to substantiate the state's interest in the social class composition of the schools.[246] This interest in turn can be said to support the validity of integrating by race, since racial balance will tend to produce social class balance. The indirect impact of race distribution was described in the *Coleman Report*, which stated (1) that the achievement of each racial group increases as the proportion of white students in the school increases, and (2) that this resulted "not from racial composition per se, but from the better educational background and higher educational aspirations that are, on the average, found among white students."[247]

It may be unnecessary, however, to rely on the inexact and transient relationship between race and social class as a basis for purposeful integration. A direct correlation between racial balance and student performance was disclosed on re-analysis of the *Coleman Report* data by the United States Civil Rights Commission.[248] The Commission, while agreeing that social class level influences performance, stated that the racial composition of the student body has a separate differential effect.[249] The apparent conflict between the latter conclusion and Dr. Coleman's conjecture on the same subject

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242. *Id.* at 302 (emphasis omitted).

243. *Id.* at 297, 304-05.

244. Kaplan, *Segregation Litigation and the Schools—Part II: The General Northern Problem*, 58 NW. U. L. REV. 157, 209 (1963).

245. *See, e.g.*, Wilson, *Educational Consequences of Segregation in a California Community*, in app. C-3, U.S. COMMISSION ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS (1967); Wilson, *Residential Segregation of Social Classes and Aspirations of High School Boys*, 24 AM. SOC. REV. 836 (1959). Criticisms of Dr. Coleman's procedures have failed to take account of these confirmatory studies.

246. *See* Kaplan, *supra* note 244.

247. COLEMAN REPORT 307.

248. U.S. COMMISSION ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS (1967) [hereinafter COMMISSION REPORT].

249. *Id.* at 91, 204.

does not militate against holding that racial balance is a permissible objective. Courts have deferred to the legislature on threshold questions in other areas, despite conflicting evidence from the social sciences,[250] and this seems entirely proper, for the task of choosing between plausible opposing views in defining governmental objectives is primarily for the legislative branch.[251] In light of the limits of existing knowledge, an official determination that racial interaction improves the educational product of the school system is entitled to similar respect in the Supreme Court.[252]

But even if closer review is dictated by the racial nature of the purpose to integrate, the results should be the same. Assuming that the evidence is too fragmentary to prove that racial isolation per se influences student performance, other adverse effects of segregation will provide important cumulative support. First, studies have demonstrated that predominantly Negro schools are often academically undernourished. The *Coleman Report* and the *Commission Report* show that Negro students generally have access to fewer books and laboratories, attend larger classes, are taught by less capable instructors, and have fewer curricular and extracurricular programs available to them.[253] Some of these deficiencies may be caused by willful state discrimination; others may reflect the interests of students or a preference among teachers for middle class schools. In any event, the problem might reasonably be attacked by integrating the student body. Racial integration would help to insulate minorities both

250. *See* the separate opinions of Justice Harlan in Poe v. Ullman, 367 U.S. 497, 546-47 (1961) (dissenting opinion), and Roth v. United States, 354 U.S. 476, 501-02 (1957) (concurring opinion), which note the deference given to legislative judgments concerning marriage, abortion, sterilization, euthanasia, and similar subjects.

251. *Cf.* Standard Oil Co. v. City of Marysville, 279 U.S. 582 (1929); McLean v. Arkansas, 211 U.S. 539 (1909).

252. *See* Beauharnais v. Illinois, 343 U.S. 250, 262 (1952). Admittedly, integration can be detrimental in the short term. Some children have not been prepared for the demands of integrated schools and may experience losses in performance and self-esteem. The states are entitled, however, to look beyond the immediate effects of integration in fixing public policy. It has also been found that "schools bring little influence to bear on a child's achievement that is independent of his background and general social context." COLEMAN REPORT 325. This finding may reflect the emphasis placed on a schoolwide analysis rather than on specific classrooms within the schools, which some have considered a more relevant context. *See* COMMISSION REPORT, app. C-1. In any event, the states may properly decide to exert whatever influence they have in favor of improving the education of each student. In doing so, however, they should recognize that (1) the adverse effects of integration may preclude the differential treatment of Negro children over the objection of their parents, and (2) the finding that schools have a minimal impact on achievement calls for a re-examination of the casual assumption that the government's educational function is vastly more important than its other functions.

253. COLEMAN REPORT 9, 12; COMMISSION REPORT 92-94. The extent of the disparities and their effects on student achievement were less than had been assumed.

against discriminatory allocation of resources and against fortuitous disadvantages emanating from faculty or student preferences. Second, there is evidence that segregated education impedes understanding between the races and contributes to mutual fear and hostility. White persons who attend integrated schools are found to be generally more receptive to adult contacts with Negroes, and Negro children in such schools are less likely to develop attitudes which alienate them from the rest of society.[254] Racially balanced schools may thus tend to interrupt the self-perpetuating process by which segregated education reinforces segregated employment and housing patterns, and is in turn reinforced by them. Finally, state concern over racial imbalance might be justified by subjective considerations analogous to those which prevailed in *Swain v. Alabama*.[255] If, for example, Negro students interpret de facto segregation as implying the superiority of the white race, it is likely that their self-esteem and motivation will suffer. In the long run those subjective feelings may impair achievement, whether or not this is indicated by current testing.[256]

Yet in spite of the potential academic advantages of integrated schools, racial separatists, both white and black, may urge that purposeful integration is objectionable in principle because of its impact on other values. Some Negroes argue that integration restricts their freedom of association, adversely affects black culture, and impairs the black student's self-image and sense of security. Claims by whites, perhaps more accurately described as fears, appear to be based on alleged negative effects on integrated education on middle class students.

Although the objections which blacks advance against purposeful integration are forceful, it should be recognized that some of these claims were implicitly rejected by the *School Segregation Cases*. Those cases, though dealing primarily with the desire of southern whites not to associate with Negroes, necessarily restrict also the freedom of blacks who prefer not to associate with whites. Indeed, one of the arguments repeatedly advanced for segregation was that Negroes themselves wanted separate facilities. That argument had self-serving overtones, but it was widely acknowledged that for many

254. COMMISSION REPORT 109-10.

255. 380 U.S. 202 (1965).

256. "A frequently postulated cause of the low achievement levels of Negro youths is their pessimistic view of their own ability to do better. This discouraging view is presumably an internalization of a social definition of their own worth." Wilson, *Educational Consequences of Segregation in a California Community*, in COMMISSION REPORT, app. C-3, at 192.

Negroes the implementation of *Brown* and its progeny would mean some loss of security and a considerable degree of compulsory association with nonblacks.[257] Moreover, it was clear even prior to *Brown* that states have the power to enforce racially neutral attendance plans which incidentally increase integration; and while this does not establish the validity of purposeful integration, it responds sufficiently to the claim of associational freedom.

A number of objections by whites to integration in principle are either tenuous or predicated on transitional difficulties. Social science evidence does not support the charges that integration will seriously depress the academic performance of white students or that it will produce lasting abrasiveness between the integrated groups.[258] Similar opposition, based on the apprehension that white children will be unfavorably "influenced" by Negroes, is basically an expression of white supremacy; those fears are no more persuasive as a basis for denying civil rights in schools than they were with respect to housing, jobs, and public accommodations.[259]

Other objections to purposeful integration, although not tenuous, are addressed to problems that are sometimes encountered in integrated education but far from inherent in it. The threat to black culture and to the self-image of black students which has been perceived in integrated schooling is certainly not a necessary part of it. Objections of this kind speak to grievous but remediable defects, and not to integration in principle. Black spokesmen have often recognized this fact and have carefully stated their position in terms of "integration as it is currently practiced."[260] In any event,

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257. *See* Green v. County School Bd., 391 U.S. 430 (1968), which rejected freedom of choice when other school plans would lead to more effective desegregation.

258. For a concrete example of school integration which is said to have had neither of these effects, *see* Sullivan, *Implementing Equal Education Opportunity*, 38 HARV. EDUC. REV. 148, 150-51 (1968).

259. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

260. S. CARMICHAEL & C. HAMILTON, BLACK POWER 55 (1967). Unlike integrated housing, which some blacks see as destroying the political and cultural strength of the Negro community, school integration leaves most aspects of the student's life open to any all-black activities he and his parents desire. If integrated schools do their job properly, and if black organizations continue their efforts to increase black pride, the child's self-image and cultural heritage need not be threatened. The current drive for black identity, it should be remembered, did not originate in the public schools, and the momentum of that drive will probably be easier to sustain than it was to develop.

Nevertheless there are obvious lessons to be drawn from Negro criticisms of integration. If plans to achieve racial balance do not also include remedies for the stated defects, they may lose the indispensable support of the black community and may aggravate rather than redress educational deficiencies.

it seems likely that even blacks who now favor separatism would find no profit in a decision that invalidated in a single stroke all attempts at purposeful integration by holding it impermissible in principle. A black separatist can easily address his objections to particular measures which he deems undesirable without attacking the constitutionality of purposeful integration—a strategy which will intrude far less on the freedom of other blacks to choose for themselves and on his own freedom to take a different course should he later wish to do so.[261] The movement for racial equality has undergone numerous tactical changes in a brief period of time, and no one can safely assume that there will not be future changes. It seems consistent with the need for flexibility, and with the ultimate goals of racial justice, to hold that purposeful integration is permissible in principle and then to inquire into the validity of specific proposals.[262]

B. *Methods of Correcting Racial Imbalance*

Although the states have a legitimate interest in the racial composition of the schools, it does not necessarily follow that they may employ racially differentiated means to advance that interest. Proposals for correcting imbalance vary widely both in their capacity to cope with the problem and in the legal issues they present.[263] These proposals can be divided into three categories. One involves dif-

261. Black spokesmen of every persuasion have been careful to preserve options and to insist that the decision of Negroes who seek integration "be supported and enforced by the entire American structure." F. McKissick, Three-Fifths of a Man, 153 (1969). A contrary view, repudiating all efforts at purposeful integration, would subject Negroes in some parts of the country to needless hardship and would give great encouragement to those who wish to do nothing about racial inequality. On the other hand, certain programs, such as bussing black children far out of their neighborhood, have sometimes been opposed because they inhibit parental participation in the child's education. Hamilton, *Race and Education: A Search for Legitimacy*, 38 Harv. Educ. Rev. 669, 677 (1968).

262. Purposeful integration seems to be required by United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969), in formerly de jure segregated school systems. *See* notes 231 and 237 *supra*. Perhaps this type of racial classification is peculiarly "necessary" in that context because of the history of southern resistance to *Brown*. *See* McLaughlin v. Florida, 379 U.S. 184 (1964). It would be anomalous, however, to hold that purposeful integration is required in the South and not even permissible elsewhere. More probably, the Court will hold that racial classifications are generally less objectionable when they merely define governmental objectives than when they are used to allocate benefits or burdens on the basis of color—a distinction applicable to cases of racial imbalance.

263. *See generally* Hellerstein, *The Benign Quota, Equal Protection and "The Rule in Shelley's Case"*, 17 Rutgers L. Rev. 531 (1963); Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 Nw. U. L. Rev. 363 (1966); Navasky, *The Benevolent Housing Quota*, 6 How. L.J. 30 (1960). *See also* Bittker, *supra* note 143; Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 Harv. L. Rev. 564 (1965).

ferential treatment of individuals on the basis of race, such as permitting only Negroes to transfer out of ghetto schools. The other two types of remedies classify groups rather than individuals,[264] and though calling for less discussion on the question of constitutionality, they may ultimately prove to be more important and more feasible measures.

With regard to the first category, all of the reasons which support the objective of integrating the schools are relevant in determining whether, as a means to that end, the states may subject individuals to racially differentiated treatment. In addition, it is often urged that the history of discrimination against Negroes makes continuing differential treatment appropriate. This argument, which implies a duty rather than freedom to take corrective action, is twofold. It relies first on the government's past complicity in racial discrimination. Official enforcement of restrictive covenants, of segregation, and of other discriminatory practices is said to warrant corrective measures based on race. Second, the argument relies on the manifest privation of Negroes, asserting that because of past prejudice they cannot now achieve equality without compensatory treatment.[265] A color-blind government, it is contended, cannot satisfy present needs, much less redress accumulated grievances; instead the government must make allowance for the special treatment of those who were disadvantaged by more than a century of color-consciousness.

These contentions have great moral appeal, but they overlook many of the risks inherent in racially differentiated treatment—risks which are especially grave to Negroes and members of other minority groups. Such treatment, even though intended to neutralize discrimination and to achieve educational equality, may actually generate more private prejudice. Blacks as well as whites may instinctively attribute the preferential treatment of a minority race to a low assessment of its capabilities. Racially predicated governmental action may thereby appear to confirm the folklore of racism, and it cannot be assumed that appearances will give way to underlying subtleties. Furthermore, a principle permitting such action could not be easily controlled.[266] Courts might demand that racially dif-

264. *See* notes 291-97 *infra* and accompanying text.

265. Remedies for racial imbalance frequently are not regarded as "compensatory"; but if members of only one race are allowed to transfer to a school with a higher social class level, there will obviously be a benefit for them and a disability for those denied that choice. The notion of compensation is also implicit in other remedies and in fields other than education.

266. *See* Bittker, *supra* note 145, at 1410-16.

ferentiated treatment be "benign" or "benevolent," but neither blacks nor other minorities would find protection from discrimination in those conclusory labels. Experience surely suggests that in matters of race what seems benign one year may be exposed as invidious the next. The application of so uncertain a standard could well produce more racial imbalance rather than less, for as Professor Bickel has observed:

> . . . a benevolent quota, like token integration, may be grounded in a realistic racism, which desires to continue as much compulsory segregation as the authorities can be brought to tolerate. Very occasionally, the racist motive may be provable. For the most part, it can only be surmised . . . . The immediate effect of the quota, moreover, is the same no matter which motive animates it.[267]

Thus, the purposeful assignment of a Negro principal to a partially Negro school may be intended either to provide psychological support for black students or to encourage a trend toward complete segregation. A factual determination would entail consideration of a great many variables, including teacher and parental attitudes, which courts are ill-equipped to measure. When, in addition, the economic and educational costs of integration are taken into account,[268] the judicial task of deciding whether or not differential treatment is "benevolent" assumes heroic proportions.

But the apprehension aroused by racially differentiated treatment of individuals does not rest simply on its susceptibility to misuse. A benevolent school quota of seventy whites to thirty blacks, for example, is open to criticism, not only on the abstract ground that in principle it is indistinguishable from tokenism, but also because it discriminates solely on the basis of color against both the seventy-first white student and the thirty-first Negro student.[269] To the latter it will be small comfort that his exclusion from preferred classrooms is expected to promote the long-range interests of other Negroes.[270] And the white child whose exclusion protects his race against self-damaging concepts of superiority suffers much the same injury. White children, it is true, have been found to be generally

267. A. BICKEL, THE LEAST DANGEROUS BRANCH 62 (1962).

268. *See* notes 252 *supra* and 298 *infra*.

269. A flexible quota would pose essentially the same constitutional problem as a rigid one, although its discriminatory qualities would be harder to detect.

270. "[I]t cannot be denied that in its objective operation, a benevolent quota is as invidious as straight-out segregation. The difference in immediate effect is that some Negroes will not be denied their freedom to associate. But most Negroes will be, and the others will be allowed to associate only on the basis of special arrangements that proclaim their apartness and hence inferiority." A. BICKEL, *supra* note 267, at 61.

less sensitive than Negroes to variations in the school quality, and their performance may tend to be less affected by changes in social class level.[271] But to assert that this is usually so does not gainsay that in particular cases a white child will be just as responsive to school conditions as a Negro child. If he is nevertheless excluded, it is because of factors which are common to his race, but neither uniquely nor universally applicable to it.[272] This kind of disability, imposed on the basis of racial generalizations, is at odds with the Court's repeated emphasis on the "personal and present" nature of equal protection rights[273] and inconsistent with most of the case law from *Buchanan v. Warley*[274] to *Loving v. Virginia*.[275]

Moreover, it is not clear that the government's previous involvement in discriminatory practices, or the educational needs resulting from those practices, can justify otherwise invalid racial disqualifications. Legislation based on personal need has a long history which plainly establishes the constitutionality of compensatory training for the disadvantaged. But special treatment of a racial class, drawn to include individuals of diverse need and to exclude others of equal need, is quite another matter. If compensation is allotted on the basis of race, middle class blacks who have escaped at least some of the ravages of discrimination will share in limited remedial resources, and they will do so at the cost of diminished aid to the poor. On the other hand, underprivileged nonblacks who may have been injured in substantially similar ways[276] will be denied benefits which persons

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271. COLEMAN REPORT 297; COMMISSION REPORT 84-86.

272. The predicament of Mexican-Americans and Puerto Ricans, who do not qualify racially for preferences accorded to Negroes but have similar educational needs, dramatically illustrates a major defect of this type of classification. The defect might be ameliorated by treating members of these groups as "Negroes." But what would be the justification for failing to treat lower class "whites" the same way? The condition of not sharing one's disabilities with other members of a readily identifiable class scarcely seems a suitable basis for unfavorable governmental treatment. *But see* text accompanying notes 158-69 *supra*.

273. "[P]etitioner's right [to attend a state law school] was a personal one. It was as an individual that he was entitled to the equal protection of the laws . . . ." Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 351 (1938). To the same effect *see* Sweatt v. Painter, 339 U.S. 629 (1950); Sipuel v. Board of Regents of the Univ. of Okla., 332 U.S. 631 (1948); McCabe v. Atchison, T. & S.F. Ry., 235 U.S. 151 (1941). Although this rule was developed during the decline of the separate but equal doctrine, it continues to be applicable in the post-*Brown* era. Watson v. City of Memphis, 373 U.S. 526, 532-33 (1963).

274. 245 U.S. 60 (1917).

275. 388 U.S. 1 (1967). For a use of numerical ratios which do not require racially differentiated treatment of individuals, *see* United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969); notes 227-38 *supra* and accompanying text.

276. "[T]hough, with respect to the Negro member of [the] underclass, it is relatively easy to isolate specific types of deprivation at the hands of society and thereby explain their present status, the chances are that if we examine all the other mem-

of the same means, but of a different color, are accorded. Under the theory relying on prior governmental discrimination, the validity of corrective racial differentiation would apparently vary with the state's antecedent race policies. In a mobile society in which bigotry has not been uniform, this rule would be bound to produce anomalous results.[277] But more fundamentally, the government's past involvement in discriminatory practices is simply not relevant to the claim of the individual who is prejudiced by differential treatment and who was not himself implicated in the previous wrongdoing, save in the collective sense in which we are all morally responsible for permitting official discrimination to permeate our society.[278]

Finally, it has been urged that the "most important" objection to this type of classification is that it "weakens the government as an educative force."[279] It has taken the better part of half a century to establish the requirements of equality that characterize the race relations cases. In voting,[280] education,[281] job opportunity,[282] housing,[283] and other areas[284] the Court has repeatedly invoked the principle that differences in race do not warrant differences in official treatment of individuals. A decision upholding a benevolent quota would undermine that principle in both the public and the private

bers, we will find that each of them, in one way or another, has somehow been injured by our society." Kaplan, *supra* note 263, at 374.

277. Often the minority group members most in need of preferential treatment are those who were forced to move from a state which practiced severe discrimination to one which did not. Furthermore, anomalous results cannot be avoided by charging discriminatory practices to the national government, for the local effects of federal discrimination vary as much as local practices.

278. Analogies have been drawn to the special treatment of women and to the disestablishment of company-dominated labor unions. *See* P. FREUND, ON LAW AND JUSTICE 46 (1968); Kaplan, *supra* note 263, at 365. But in those situations the classifying trait was racially neutral. Women often can be treated differently from men in circumstances in which Negroes and whites must be treated alike. *See, e.g.*, Hoyt v. Florida, 368 U.S. 57 (1961), upholding a provision limiting jury service by women to volunteer registrants. Similarly the disenfranchisement of members of a company-dominated union is quite different from the disenfranchisement or other differential treatment of a racial group.

In any event, it is interesting to note that the current emphasis on black pride and independence seems to have aroused Negro opposition to racial preferences. A recent survey found that blacks, "by an overwhelming 84-10 per cent, reject the idea of preferential treatment . . . in reparation for past injustices." NEWSWEEK, June 30, 1969, at 20.

279. Kaplan, *supra* note 263, at 379.

280. *E.g.*, Smith v. Allwright, 321 U.S. 649 (1944).

281. Brown v. Board of Educ., 347 U.S. 483 (1954).

282. Colorado Anti-Discrimination Commn. v. Continental Air Lines, Inc., 372 U.S. 714 (1963).

283. Reitman v. Mulkey, 387 U.S. 369 (1967); Shelley v. Kraemer, 334 U.S. 1 (1948).

284. *E.g.*, Watson v. City of Memphis, 373 U.S. 526 (1963); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

domain.[285] Such a decision would imply that there are important differences between the races, apparent if not real, and that those differences are sufficient to justify governmental action which perforce must be described as racially discriminatory. If this premise is accepted in order that fair-minded officials may allocate more benefits to a racial minority than it now receives, will there be any principled basis on which to prevent future officials from allocating fewer benefits to such a group? A quota which aids a particular minority today may handicap that minority when its members become successful in disproportionate numbers.[286] And even while the quota remains "benevolent," it is likely to operate at the expense of another group which has essentially the same needs. A system so administered seems certain to be highly divisive and to dilute the political strength of all minority groups by placing their interests in sharp conflict.

Perhaps the risks inherent in racially differentiated treatment of individuals would be justified if no other effective way could be found to attack inequality. But other means, which can achieve as much as benevolent quotas while risking less, are available to any legislature that has the will to employ them.[287] Congress and the states have broad power to correct the effects of past discrimination through racially neutral legislation. The Voting Rights Act of 1965,[288] for example, precludes certain states from using literacy tests, however impartially administered, when those tests specially burden Negroes because of separate and unequal education.[289] This legislation is racially neutral inasmuch as it relieves all citizens of

285. The loss of "educative force" may be less than has been supposed, when due regard is given to the decisions which have already upheld racial distinctions. But it seems fair to say that the educative impact would be greater here than it was in the jury cases, in which racial classification was less visible, or in the cases of federal discrimination, in which exceptional circumstances were pleaded.

286. *See* N. ABRAMS, FOREWORD TO EQUALITY ix (1965), for an illustration of a quota that was used to restrict a successful ethnic minority.

287. A legislature which fails to make use of its present authority is unlikely to apply a racial quota in the manner intended by its proponents. On the other hand, many officials who are sympathetic to the demands of minority groups may utilize benign quotas without case support. Accordingly, even if racially differentiated action were deemed necessary, it might still be imprudent for the Supreme Court to legitimate the practice formally. *See* Korematsu v. United States, 323 U.S. 214, 246 (1944) (dissenting opinion), in which Justice Jackson noted the difference between racial discrimination by the Executive, which he called "an incident," and its validation by the Court, which he said leaves a constitutional principle lying "about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."

288. 42 U.S.C. § 1973b(c) (Supp. IV 1965-1968).

289. Gaston County v. United States, 395 U.S. 285 (1969).

the literacy requirement, but it benefits primarily those who have been subjected to discrimination in the past and who would continue to suffer under a rigorous literacy standard. The approach taken in the Voting Rights Act is open to wide application. State universities, for instance, can admit on a nonracial basis students who, because of previous disadvantages, do not qualify under the existing admissions requirements; and public employers can adopt analogous hiring practices.[290] In circumstances in which preferences are necessary to remedy existing inequalities, differential treatment can be based directly on need. Corrective action which meets the needs of black people, while also responding to the fact that those needs are shared by nonblacks, will be less divisive than racial quotas and far less vulnerable to misuse. At the same time, a compensatory policy which embraces all persons similarly situated will be more likely to gain political support and less likely to be judged paternalistic by its beneficiaries.

The other two categories of corrective action mentioned earlier require only brief comment. One group of remedies disregards the race of individuals and deals with neighborhoods instead. This approach, which has the debatable advantage of obscuring the government's policy to classify racially, can be implemented by site selection, rezoning, and selective bussing.[291] In each case it is possible to formulate a program of neighborhood classification which in effect constitutes a pure subterfuge. For example, transforming community boundaries from a geographical square to "an uncouth twenty-eight-sided figure"[292] may be tantamount to differential treat-

290. Difficult questions can be raised concerning the wisdom of these policies in specific situations. Such questions belong, however, in the political rather than the constitutional sphere.

In Gaston County v. United States, 395 U.S. 285 (1969), the Court had no occasion to consider whether Congress could abolish literacy tests for persons who received separate, unequal education and still retain such tests for other citizens. A classification of that kind would be underinclusive, since it would not reach persons poorly educated in nonseparate schools. But for the same reason, the classification is not precisely racial—all persons attending nonseparate schools would be treated alike. A classification reaching persons who have been "subjected to racial discrimination" would avoid some of the constitutional barriers to racially differentiated treatment, but it might invite the same political repercussions and would be difficult to administer.

291. The effectiveness of these measures has been explored elsewhere. *See* Fiss, *supra* note 263, at 570-74. Some remedies, such as site selection and the pairing of imbalanced schools, are helpful in small communities but not in metropolitan areas where the problem is most acute; other measures depend, perhaps unrealistically, on the underutilization of racially balanced schools or on student and parental initiative. Bussing and rezoning which sacrifice geographic compactness create strong resistance and may result in the withdrawal of white students to private or suburban schools.

292. Gomillion v. Lightfoot, 364 U.S. 339, 340 (1960).

ment of individuals, and hence may raise the same issues as the first group of remedies. The challenging question is whether, such extreme cases aside, it is permissible to select neighborhoods for assignment to a given school district on the basis of their racial composition.[293] Supreme Court decisions do not indicate a difference of constitutional dimensions between neighborhood and individual classification by race. Yet, to many observers, differential treatment seems to be less offensive when it embodies judgments in gross. Racial classification of neighborhoods would call for like treatment of all people within a given geographical area and would not involve courts in the obnoxious business of determining a person's race. Moreover, it may be impossible in many areas to eliminate racial imbalance without some classification of this kind, and consequently future cases may conceivably yield to that pressure.

The last group of remedies does not involve racial classification of either neighborhoods or individuals within a school system. Under these remedies, integration is produced by establishing central schools that draw students from all neighborhoods within the system or else the racial distribution of students is altered by voluntary transfers, random assignments, open enrollment, or free choice plans.[294] These corrective measures classify by race in the sense that a purpose of the state's action is to affect the racial composition of schools. But if, as suggested above, integration is a legitimate governmental goal,[295] remedies of this kind seem constitutionally unassailable.

Thus, some remedies for racial imbalance will not encounter any decisive legal barrier,[296] although they will be subject to political

293. The distinction between gerrymandering which produces a twenty-eight-sided figure and gerrymandering which yields a compact geographic unit is subtle. Presumably the latter serves interests other than integration, and it has the appearance of being less arbitrary. In any case, segregated housing patterns may make neighborhood classification seem qualitatively similar to individual classification.

294. Some plans to consolidate a range of grade levels on a central campus, called an educational park or plaza, have also proposed that students be drawn from adjacent school districts. *See* Fischer, *The School Park*, in COMMISSION REPORT, app. D-2, at 253-60. Although there are conceptual similarities between redefining the boundaries of a school system and rezoning neighborhoods within the system, the educational park may properly be included in the last group of remedies. Establishment of the park is certain to involve nonracial considerations which insulate against discrimination, and it is far removed from racially differentiated treatment of individuals. Whereas racial considerations are often paramount in rezoning neighborhoods, they are submerged in the concept of educational parks.

295. *See* notes 241-62 *supra* and accompanying text.

296. These remedies would, of course, impinge on the student's freedom of association, as would any effort to alter the composition of the schools. But the *School Segregation Cases* show that there is no general right to avoid undesired contacts in public schools, and it has never been thought that the neighborhood school policy is unconstitutional because it forces children in a common zone to attend classes to-

limitations, as well as to limitations in effectiveness and economic resources. There is reason to doubt that the political processes could operate at the present time to impose a school program which a substantial majority of the community believed would disadvantage their children. There is even greater reason to doubt that such a program could succeed, if adopted. The plan for integration that seems most likely to win essential public support is not one which calls for sacrifice by some groups for the benefit of others, however much that may comport with one's sense of justice in particular circumstances, but rather one which visibly operates to the mutual benefit of all groups.[297] A plan of the latter description is likely to engage no constitutional difficulty.

C. *Black Separatism As a Means to Educational Equality*

The discussion to this point has concentrated on attempts to achieve racial balance and thereby to promote equal opportunity in the schools. But integration is at best a slow and partial answer to the problem of unequal education. Even the most conscientious efforts to integrate the schools will fail for some years to reach many of the children in urban ghettos. Furthermore, integration will involve transitional problems of academic and social adjustment; and most significantly, it is sometimes perceived by Negroes as an expression of white superiority, as a threat to black cultural heritage, and as a drain on the resources of the Negro community.[298] Other approaches to educational equality have therefore been explored. The new militancy, which represents a growing segment of Negro thought, but should not be mistaken for its entirety, urges for the present time a policy of black control of black institutions.

Although in the field of education, as elsewhere, proposals for what may loosely be called "black separatism"[299] have been wide-ranging, there is a core of illustrative specifics on which attention can be focused. These include demands for all-Negro dormitories and "autonomous" black studies programs at the college level, and

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gether. It is difficult therefore to maintain that associational guarantees forbid the purposeful inclusion of "non-neighbors" in particular schools.

297. Assuming its economic and educational feasibility, the educational park might meet this standard. The park not only would provide integration, but it would offer to all students advantages of technology, specialized curriculum, counseling, and other services which no single school could afford.

298. *See* S. CARMICHAEL & C. HAMILTON, *supra* note 260, at 53-55.

299. The term is used here merely as a convenient way to describe a collection of diverse programs. Some Negroes may prefer the term "black nationalism," and others may endorse specific policies but reject both terms.

for Negro principals and, more generally, black control of black community schools at pre-college levels. Since there has been no reported case involving these programs and little experience with their operation, it is hazardous to predict how the Court will deal with them. But black separatism raises such urgent issues—ones which lower courts will soon face—that at least a preliminary analysis, based on decisions concerning other racial classifications, should be offered.

Because proposals for separatism have been associated with the black power movement, and because of the emotion aroused by that movement, the purposes of this kind of segregation are often misunderstood. Unlike traditional caste segregation, black separatism does not appear to have as its goal the subjugation of racial classes, although its treatment of individuals, as distinguished from groups, sometimes bears painful similarity to the discriminatory treatment of Negroes. The immediate aim of black separatism is said to be the elimination of social practices which operate as subtle instruments of white racism. In the primary and secondary schools the emphasis has been on decentralization and community control. The main objectives evidently are (1) to secure parent involvement in the operation of the schools;[300] (2) to make the educational system accountable and responsive to the community through the local election of administrators and governing boards; (3) to support the self-image of black students by hiring black personnel, especially black principals; and (4) to control curriculum, academic standards, and the selection of instructional materials as a means of assuring suitable treatment of subjects such as Negro history and Afro-American culture.[301] The themes that run throughout these proposals and the demands for black studies and segregated dormitories are the promotion of black pride and group solidarity, the accountability of schools, and greater responsiveness to black needs. Control of educational institutions, some advocates believe, will meet the threat to the black cultural heritage and to the manpower resources of the ghetto. It may also stimulate other political activities in the black community, leading to control over welfare, health, and law enforce-

300. This new responsibility may have favorable effects on parents themselves and will provide them with experience which they can apply in other areas. If a sense of control is also transmitted to the child, it may improve his ability to learn, since the COLEMAN REPORT found that the feeling of control over environment is highly related to the scholastic achievement of minority groups. COLEMAN REPORT 23. Conversely, programs which are imposed from outside and which are not supported by parents may increase alienation in the black community rather than reduce it.

301. For a detailed account of these objectives *see* Hamilton, *supra* note 261.

ment services. Finally, there is often a suggestion, sometimes implicit and sometimes explicit, that when the black community has achieved appropriate economic and political power it can consider policies of meaningful integration on a basis of parity with the white community.

Insofar as the proposed educational reforms involve only a reallocation of existing state power, they encounter no serious difficulty under the Federal Constitution. There may well be some constitutional restrictions against a redistribution of authority which is clearly designed to effectuate an impermissible purpose, such as preventing compliance with a court order to desegregate.[302] But state discretion in apportioning responsibility among various government agencies is extremely broad. In fact, decentralization of schools in metropolitan areas is no different, constitutionally, from the local control which is currently exercised by suburban school boards throughout the country. Absent evidence of an unconstitutional objective, which has not been apparent here, the states may decide for themselves whether to govern the schools through a citywide board of education or through a number of smaller boards. For the same reasons, a university can choose to exercise authority through self-regulating departments rather than through a more centralized office.[303]

A constitutional problem emerges, however, when demands are made for the adoption of policies of racial segregation and discrimination rather than for changes in governing structure. Racially separate dormitories and all-Negro departments of black studies may serve some of the psychological and cultural ends already described. The segregated dormitory also responds to the sense of isolation which black students may experience in a university environment. Some of these students feel that predominantly white dormitories are hostile and inappropriate living quarters.[304] Similarly, the presence of white students or teachers in black studies classrooms is said to cause embarrassment when sensitive topics, such as family patterns in the ghetto or crime and illegitimacy rates, are discussed.[305] It is often felt that a Negro teacher will have a better

302. *Cf.* Griffin v. County School Bd., 377 U.S. 218 (1964).

303. Autonomy may also be granted to some departments—as the American Association of Law Schools asks for its member schools—whether or not it is granted to others. A black studies faculty can be given special autonomy as long as the decision to do so is based on reasonable criteria.

304. *See* Dunbar, *The Black Studies Thing*, N.Y. Times, April 6, 1969, § 6 (Magazine), at 25.

305. *Id.*

understanding of ghetto life and will be better able to relate to it.[306] At any rate, if a class believes that this is so, the learning process may be affected, since student confidence is vital to the success of a teacher. Thus, the articulated aims of black separatism are important and challenging even when they entail racial separation.

But in spite of these important aims, the cases on racial classification suggest an uneasy constitutional future for governmental programs of this nature.[307] The difficulties begin with the school decisions. The Court clearly stated in *Bolling v. Sharpe* that "[s]egregation in public education is not reasonably related to any proper governmental objective . . . ."[308] Taken at face value, that statement could consign official policies of black separatism to an immediate demise. Yet it seems hard to justify such a statement in view of the objectives of black separatism outlined above. Few would deny the propriety of those objectives, and it is far from self-evident that racial separation is unrelated to them. Perhaps the *Bolling* statement, which had questionable validity even in the context in which it was announced, should be re-examined in light of the constitutional test announced in *McLaughlin v. Florida*.[309] The Court in that case found that racial classifications cannot be upheld unless they are necessary, rather than merely related, to an overriding legislative purpose.[310] Under that analysis the racial exclusions at issue in *Bolling* would fall because they served no "overriding" purpose, but it might be argued that black separatism serves different interests and should be permitted.

Nevertheless, even assuming *McLaughlin* is controlling, the Court may still strike down official policies of Negro-inspired segregation. First, it will be difficult to show that segregation is necessary to achieve the goals of black separatism. Other ways can probably be found to support psychological and cultural needs and to assure a classroom atmosphere conducive to learning. Second, *McLaughlin* requires that the purpose of a racial classification be overriding in relation to the harm "incurred by the affected private parties."[311]

306. *Cf.* K. CLARK, DARK GHETTO 132-37 (1965).

307. In order to stay within manageable limits, the discussion here will concentrate on the cases most likely to be deemed controlling. For one pertinent line of decisions *see* text accompanying note 126 *supra*, suggesting a pointed analogy between the rationale of some federal Indian case law and the determination of blacks to preserve their cultural heritage. *But see* text accompanying notes 142-43 *supra*.

308. 347 U.S. 497, 500 (1954).

309. 379 U.S. 184 (1964). *See* note 189 *supra* and accompanying text.

310. 379 U.S. at 192.

311. *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1067, 1103

The focus in this connection is on the objections to separatism that might be raised by blacks who favor integration, by whites, and by members of nonblack minorities.

A Negro's racial affinity to the group demanding separation will not, of course, preclude his attack on black separation.[312] Nor should it be assumed that because the new segregation is Negro-inspired it commands universal support within the Negro community. A number of blacks have already taken a strong public position against separatism. The views of Dr. Kenneth Clark bear lengthy quotation, since they are representative of this body of opinion:

> Within the past two years another formidable and insidious barrier in the way of the movement towards effective, desegregated public schools has emerged in the form of the black power movement and its demands for racial separatism . . . . These demands are clearly a rejection of the goals of integrated education and a return to the pursuit of the myth of an efficient "separate but equal"—or the pathetic wish for a separate and superior—racially-organized system of education. One may view this current trend whereby some Negroes themselves seem to be asking for a racially segregated system of education as a reflection of the frustration resulting from white resistance to genuine desegregation of the public schools since the *Brown* decision and as a reaction to the reality that the quality of education in the *de facto* segregated Negro schools in the North and the Negro schools in the South has steadily deteriorated under the present system of white control.
>
> In spite of these explanations, the demands for segregated schools can be no more acceptable coming from Negroes than they are coming from white segregationists. There is no reason to believe and certainly there is no evidence to support the contention that all-Negro schools, controlled by Negroes, will be any more efficient in preparing American children to contribute constructively to the realities of the present and future world.[313]

The chief argument of black integrationists, then, is that racial separation is educationally counter-productive. Because past dis-

(1969). It should be noted in applying *McLaughlin* that the segregative aspects of black separatism seem generally to require racially differentiated treatment of individuals and may be subject to closer review than purposeful integration, which sometimes does not involve such treatment. *See* notes 234-37 *supra* and accompanying text.

312. Whites were allowed to object to anti-miscegenation and cohabitation laws, notwithstanding their participation in the political processes that produced those laws, Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964), and blacks will likewise be heard on the issue of separatism.

313. *Alternative Public School Systems*, 38 HARV. EDUC. REV. 100, 103-04 (1968). Similar views have been expressed by Roy Wilkins and Bayard Rustin. *See* N.Y. Times, Jan. 14, 1969, § 1, at 1, col. 7; N.Y. Times, April 28, 1969, § 1, at 17, col. 6.

crimination has subjected large numbers of Negroes to economic disadvantage, racial isolation at the present time would result in social class isolation, and so lead to the educational detriment described in the *Coleman Report*.[314] There is a serious danger, moreover, that Negro demands for separatism may be manipulated by white supremacists to maintain their own brand of segregation. Indeed, the judicial task of determining the real source of segregationist preferences—black nationalism or the color caste system—seems insurmountable. The underlying premise of black separatism, that minorities can secure official segregation but the majority cannot, is equally perilous. On that basis whites who constitute a minority in their local area could demand segregated facilities, while apparently Negroes could not.[315] Some blacks may therefore contend that separatism has the potential to become an unconscious ally of white supremacy, an ally scarcely less invidious for being advocated by the most militant of Negroes.[316]

White students may also object to racially differentiated treatment, whether in black studies programs or in segregated dormitories. Their exclusion from black studies on grounds unrelated to academic qualification involves obvious disadvantages; whites, like blacks, may be interested in Negro history or in studying under Negro teachers. But even when dual facilities are "equal," as in the case of segregated dormitories, white students may challenge their differential treatment.[317] As Professor Wechsler has pointed out, whites as well as blacks suffer from racial segregation, although in

314. *Brown v. Board of Educ.* was sweeping in its appraisal of the effect of government-enforced separation: "Separate educational facilities are *inherently* unequal." 347 U.S. 483, 495 (1954) (emphasis added). The hope of black separatism is that segregation will not inflict permanent damage when it is sought by the minority rather than prescribed by the majority, and that the consequences of racial isolation may be attenuated at the college level. *But see* N.Y. Times, May 23, 1969, § 1, at 29, col. 6, in which Dr. Clark rejects the notion that "exclusion on the basis of race is any less damaging when demanded or enforced by the previous victims than when imposed by the dominant group." For a case applying the *Brown* theory of inherent inequality to a state university, *see* Florida *ex rel.* Hawkins v. Board of Control, 350 U.S. 413 (1956) (per curiam).

315. *See* Anderson v. Martin, 375 U.S. 399 (1964), striking down a racial classification which would prejudice whichever race was in the local minority. It is well to recall that in many regions where Negroes are presently a minority they will probably compose a majority in the foreseeable future.

316. The arguments of the black integrationist cannot be met merely by allowing him to withdraw from an all-Negro black studies program. He may properly object to being forced to choose between segregation and the relinquishment of desired academic courses. Furthermore, official sponsorship of separate programs for Negroes could combine with pressures from fellow students to make his choice more illusory than free.

317. *Cf.* Buchanan v. Warley, 245 U.S. 60 (1917).

different ways and for different reasons.[318] Hence a southern white should be free to object, for example, to his exclusion from the back of a state-operated bus or, in the case at hand, from a "Negro school" or a "Negro dormitory." The Supreme Court has in fact already permitted members of both races to challenge the racial segregation of public records,[319] despite the apparent "equality" of treatment.[320]

Finally, the case for nonexclusion of other minorities is perhaps the easiest to make. Their claims against discrimination by Negroes are strikingly similar to the claims which Negroes have legitimately made against discrimination by whites. Mexican-Americans, Indians, and Orientals may properly urge that in an all-Negro black studies department they are denied equality by a racial class which is larger and politically more powerful than themselves. It is difficult to see how courts could justify these exclusions while still holding, as they should, that whites cannot exclude blacks from government-sponsored activities.

But even if the Constitution restricts official enforcement of Negro-inspired segregation, it will not foreclose the implementation of black separatist programs. Those programs can be advanced in much the same way that inequality is thrust upon Negroes—through private or "fortuitous" black separatism. The neighborhood school plan, which has relegated Negro children to segregated education by racially neutral criteria, can be employed by blacks for community control systems which are equally neutral as to race. Similarly, the general immunity of private organizations to constitutional restraints can protect not only the local country club, but also black action groups which can work effectively for black pride and solidarity without official sponsorship. It will even be possible to achieve a large degree of racial separation, if that is found to be desirable.[321]

318. Wechsler, *supra* note 38, at 34. Both groups will suffer more if, as the Civil Rights Commission found, segregation operates to reinforce mutual fears and hostilities.

319. Tancil v. Woolls, 379 U.S. 19 (1964) (per curiam). *See* text accompanying notes 217-19 *supra*.

320. The objections of qualified white teachers and principals to racial restrictions on job opportunity require no commentary. *See* Colorado Anti-Discrimination Commn. v. Continental Air Lines, Inc., 372 U.S. 714, 721 (1963), observing that "any state or federal law requiring applicants for any job to be turned away because of their color would be invalid under the Due Process Clause of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment."

321. The wisdom of separatist policies, as distinguished from their constitutionality, is not considered here. For a current discussion of nonlegal issues, *see* Lewis, *The Road to the Top Is Through Higher Education—Not Black Studies*, N.Y. Times, May 11, 1969, § 6 (Magazine), at 34, which raises questions as to whether separatism can prepare blacks for the best jobs and whether whites are not more in need of black studies than are Negroes.

Assuming no governmental involvement, students are probably free to segregate themselves in dormitories or college classes by the exercise of genuine free choice.[322] Separation might also result from state action which does not classify racially. For example, students in some black studies courses might be selected on the basis of their previous exposure to ghetto life or other special qualifications.[323]

Given the limits of present knowledge, courts will probably hesitate to take a rigid attitude toward any tenable means of promoting racial equality. Conceivably some degree of self-imposed separation may ultimately facilitate integration. Black power advocates have emphasized that "[b]efore a group can enter the open society, it must first close ranks."[324] This statement seems to imply that after Negroes have developed their own strengths, and after cultural diversity has been accepted in a positive way and not as an obstruction to "assimilation," it will be possible for those so desiring to enter an integrated society. Viewed in those terms, black separatism—the closing of ranks—may become compatible rather than inconsistent with long-term integration. But unlike a number of plans for early integration, black separatism carries an inevitable risk of reinforcing traditional segregation patterns. Accordingly, separatist solutions, even when constitutionally permissible, will be approached by the courts with extreme caution.

X. Conclusion

It seems clear that the state and federal governments have broad power to answer the educational needs of black people and of disadvantaged members of other groups, and in order to do so they appear to have some power to classify by race. But the Supreme Court has not articulated a clear neutral standard by which to measure the limits of permissible racial classification. In view of past experience with governmental use of racial criteria, it is understandable that the Court should act with great precaution, even though this sometimes leads to results which are inadequately ex-

322. "There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual co-mingling of students, and the refusal of individuals to co-mingle where the state puts no such bar." McLaurin v. Oklahoma State Regents, 339 U.S. 637, 641 (1950).

323. This is substantially the position taken by the Department of Health, Education, and Welfare in enforcing title VI of the Civil Rights Act of 1964. N.Y. Times, May 3, 1969, § 1, at 1, col. 7. Close vigilance will be required if "special qualifications" are not to be used as a subterfuge for racial disabilities.

324. S. Carmichael & C. Hamilton, *supra* note 260, at 44 (italics omitted).

plained or which are not explained at all.[325] But if the tendency toward unexplained results is understandable in terms of preserving judicial options, it should also be recognized that the failure to explain, and thereby confine, can be even more threatening than fully reasoned authority permitting racial considerations. At any rate, in developing more precise standards and in responding to specific issues, reliance must be placed upon a close analysis of the racial classifications which have already been presented to the Court.

325. *See, e.g.*, United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969); Tancil v. Woolls, 379 U.S. 19 (1964) (per curiam). Swain v. Alabama, 380 U.S. 202 (1965), illustrates the carefully considered opinion which tries at times to conceal more than it reveals about permissible classification by race. *See* note 179 *supra*.